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NO.

In The

Supreme Court Of The United States

OCTOBER TERM, 1989

IN THE MATTER OF: H. ROGER LAWLER, ETC., *Debtor.*

H. ROGER LAWLER,
Petitioner,
vs

THEODORE A. PAULISSEN, et ux.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether a violation of the automatic stay by Respondents, as creditors, under federal bankruptcy law is void, not merely voidable, in light of the fundamental purpose underlying the automatic stay to protect the exclusive jurisdiction of the federal bankruptcy court over property of the estate so that it is not dismembered and so that the debtor, Petitioner, is given a breathing spell from creditor harassment and can reorganize or the estate's assets can be distributed among all creditors in accordance with federal bankruptcy law.

2. Whether a state statute of limitations bars the debtor's (Petitioner's) complaint to protect property in the exclusive jurisdiction of the bankruptcy court by virtue of the paramount federal bankruptcy law where Respondents, as creditors, violated the automatic stay in respect to the protected property and Respondents did not seek and were not granted relief by the bankruptcy court from the automatic stay.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner H. Roger Lawler ("Petitioner") respectfully prays that this Court issue a writ of certiorari to review the judgment of the Court of Appeals for the Fifth Circuit in No. 88-1738 entered August 21, 1989.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit was not published and appears in *Appendix A* herein.

JURISDICTION

On August 21, 1989, the Court of Appeals for the Fifth Circuit rendered its decision and entered a judgment in Case No. 88-1738 *(Appendix A)*. Petition for Rehearing and Suggestion for Rehearing *En Banc* were denied by order entered October 12, 1989 *(Appendix B)*.

Jurisdiction is invoked under the provisions of 28 U.S.C. sec. 1254(1) for the reason that the Court of Appeals for the Fifth Circuit decision is in conflict with *Kalb v. Feuerstein*, 308 U.S. 433 (1940), *In re Louisiana Ship Management, Inc.*, 761 F.2d 1025 (5th Cir. 1985), and a legion of decisions from eight other federal circuit courts of appeals and numerous district and bankruptcy courts.

STATUTORY PROVISIONS INVOLVED

The Bankruptcy Statute of 1898 (Bankruptcy Act), as amended; The Bankruptcy Reform Act of 1978 (Pub. L. No. 95-598) (Bankruptcy Code), as amended; Rules of Bankruptcy Procedure 401 and 601 (prescribed by this Court on April 24, 1973) (now Rule of Practice and Procedure 4001 prescribed by this Court on April 25, 1983 and 11 U.S.C. sec. 362) *(Appendix C)*; 11 U.S.C. sec. 29 (Section 11e) under the Bankruptcy Act *(Appendix D)*; 11 U.S.C. secs. 542(c) and 549 under the Bankruptcy Code *(Appendix E)*; Texas Revised Civil Statutes Annotated art. 5510, now Texas Civil Practice & Remedies Code sec. 16.026 (Vernon 1986), and Texas Revised Civil Statutes Annotated art. 5529, now Texas Civil Practice & Remedies Code sec. 16.051 (Vernon 1986) *(Appendix F)*.

STATEMENT OF THE CASE

The Court of Appeals affirmed the District Court's order affirming a summary judgment entered by the Bankruptcy Court involving the automatic stay in a case governed by

The Bankruptcy Statute of 1898 (the "Act"). The present form of the automatic stay in The Bankruptcy Reform Act of 1978 (the "Code") Section 362 made its appearance in the former Rules of Bankruptcy Procedure 401, 601, 10-601, 11-44, 12-23 and 13-401 under the Act.

Petitioner's bankruptcy was commenced under the Act by the filing of an involuntary petition on January 9, 1976. (Record Excerpts ("R.E.") 127 — Order Granting Motion for Summary Judgment, p. 1, ¶ 1). The Court of Appeals opinion, page 4, in error states that Petitioner was a debtor-in-possession; he was simply a debtor, there being a bankruptcy trustee who was appointed and not discharged until 1985.

Petitioner's bankruptcy was very large and involved numerous complex questions. In 1978, Petitioner consented to adjudication and various of Petitioner's entities were consolidated in the proceeding, making it one of the largest personal bankruptcies in the Northern District of Texas at the time. Petitioner's consent to adjudication and the consolidation of the other entities as his alter ego occurred after extensive litigation before the Bankruptcy Court. (R.E. 127 — Order Granting Motion for Summary Judgment, p. 1, ¶ 2). The case was converted to a Chapter XI on June 19, 1979, but the proposed Plan could not be confirmed until resolution of protracted litigation over a $16 million IRS claim before the Bankruptcy Court. The extensive litigation involving adjudication and alter ego, the $16 million claim by the IRS, the conversion of the case to a Chapter XI on June 19, 1979, and the filing of a Plan consumed the Bankruptcy Court, Petitioner, and the bankruptcy trustee's time from 1976 to early 1981. The IRS claim was concluded in 1984, and the Plan was confirmed paying creditors 100 percent of their principal and interest post-petition. (R. 335).

Prior to the bankruptcy, Mr. and Mrs. Paulissen ("Respondents") sold to Petitioner property located in Collin County, Texas taking a note from Petitioner as part of the purchase price; the note was secured by a deed of trust lien on the property. (R.E. 127 — Order Granting Motion for Summary Judgment, p. 1, ¶ 3). After filing of the bankruptcy, a notice of pending bankruptcy, i.e., *lis pendens,* was filed in Collin County. (R.E. 23 — footnote 1). Thereafter, on May 3, 1977, Respondents attempted to foreclose on Petitioner's property. (R.E. 128 — Order Granting Motion for Summary Judgment, p. 2, ¶ 4). Respondents attempted to reacquire title in satisfaction of the debt by taking a deed to the property while the automatic stay was in effect in Petitioner's proceeding and the property was in the exclusive jurisdiction of the Bankruptcy Court. Respondents did not move the Bankruptcy Court to lift, terminate, annul, or otherwise modify the automatic stay.

As required, Petitioner gave the bankruptcy trustee a reasonable opportunity to take action on Respondents' attempted wrongful foreclosure. Respondents entered an appearance on Petitioner's application filed on May 22, 1981 to cause the bankruptcy trustee to make a decision and to give Petitioner authority to employ counsel if the bankruptcy trustee declined to proceed against Respondents. (R.E. 96 — 7/30/81 hearing, p. 7. l. 8-9 — R. 359). In 1981, Bankruptcy Judge Gandy addressed the merits of Petitioner's case against Respondents and noted that any statute of limitations as to Respondents' wrongful foreclosure had been tolled:

> THE COURT: I certainly concede that's a far better case than I originally thought it was. If there was foreclosure on the debtor while an involuntary is pending

> without the stay being lifted and with the tolling statutes that exist in regards to the statutes of limitation, why it could very well be a cause of action that the estate ought to bring.

(R.E. 106-107 — 7/30/81 hearing, p. 17, l. 23 to p. 18, 1.4 — R. 369-370).

Judge Gandy stated that the delay resulted only from the Bankruptcy Court's "foot dragging" on the tax issue and its own "dilatory way" since it did not want to approve legal fees for Petitioner to proceed with the improper foreclosure action against Respondents until the tax issue was concluded. (R.E. 95-96 — 7/30/81 hearing, p. 6, l. 3 to p. 7, l. 2 — R. 358-359).

Thereafter, the bankruptcy estate was determined to be solvent even with the IRS claim, so in the Bankruptcy Court, Petitioner filed a complaint alleging that the attempted foreclosure sale and purchase by Respondents of Petitioner's property in the *custodia legis* of the Bankruptcy Court was void since Respondents violated the automatic stay. (R.E. 38-42 — Original Complaint; R.E. 128 — Order Granting Motion for Summary Judgment, p. 2, ¶ 6). The Bankruptcy Court approved the payment of Petitioner's attorneys' fees for filing the complaint, and the confirmed Plan continued Petitioner's authority to prosecute the action for the estate. Respondents answered alleging that a Texas statute of limitations barred Petitioner's complaint. Respondents' motion for summary judgment on the sole ground of the Texas statute of limitations was granted in 1987 by Bankruptcy Judge Akard and affirmed by the Court of Appeals.

On August 21, 1989, a panel of the Court of Appeals in its opinion for the first time concluded that violations of the automatic stay are voidable, not void. The Court of Appeals

opinion of August 21, 1989 cited as authority an opinion rendered four days *later* on August 25, 1989 by another panel of the Court of Appeals. *Sikes v. Global Marine Inc.*, 881 F.2d 176 (5th Cir. 1989) (Johnson, J., dissenting) (*"Sikes"*) (*Appendix G*). In *Sikes*, Judge Johnson strongly dissented based on the fundamental public importance of the automatic stay. *Sikes* was decided under the automatic stay provisions of the Bankruptcy Code.

In the instant case, the Court of Appeals concluded that Section 11e under the Bankruptcy Act (formerly at 11 U.S.C. sec. 29) required the application of the four-year Texas statute of limitations (Texas Revised Civil Statutes Annotated art. 5510, now Texas Civil Practice & Remedies Code sec. 16.026), not the ten-year Texas statute of limitations (Texas Revised Civil Statutes Annotated art. 5529, now Texas Civil Practice & Remedies Code sec. 16.051), since the four-year statute applied to voidable transactions and the ten-year statute applied to void transactions. Essential to the decision was the Court of Appeals' conclusion that the transaction at issue was merely voidable, not void, since it involved a violation of the automatic stay under federal bankruptcy law.

ARGUMENT

This Court in *Kalb v. Feuerstein*, 308 U.S. 433 (1940) (*"Kalb"*), established this axiom of bankruptcy law: actions taken against a debtor, without the prior consent of the bankruptcy court, are actions taken "without authority of law" and void. 308 U.S. at 443. The opinion of the Court of Appeals disregarded the legion of courts which have reaffirmed the *Kalb* axiom that acts in violation of the stay are void, including eight of the other circuit courts of appeal and

a prior Fifth Circuit Court of Appeals decision.[1] The panel of the Court of Appeals should not have overruled its prior

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[1]*Kalb v. Feuerstein*, 308 U.S. 433 (1940); *Caribbean Food Products Inc. v. Banco Credito y Ahorro Ponceno*, 575 F.2d 961 (1st Cir. 1978); *In re Smith Corset Shops, Inc.*, 696 F.2d 971 (1st Cir. 1982); *In re Advent Corp.*, 24 B.R. 612 (1st Cir. Bankr. 1982); *Brown v. Dellinger (In re Brown)*, 734 F.2d 119 (2d Cir. 1984); *H & H Beverage Distrib. v. Dept. of Revenue of Pennsylvania*, 850 F.2d 165 (3d Cir. 1988); *In re Ward*, 837 F.2d 124 (3d Cir. 1988); *In re Louisiana Ship Management, Inc.*, 761 F.2d 1025 (5th Cir. 1985); *Potts v. Potts (In re Potts)*, 142 F.2d 883 (6th Cir. 1944); *NLRB v. Edward Cooper Painting, Inc.*, 804 F.2d 934 (6th Cir. 1986); *Smith v. First America Bank N.A. (In re Smith)*, 876 F.2d 524(6th Cir. 1989); *Matthews v. Rosene (In re Matthews)*, 739 F.2d 249 (7th Cir. 1984); *Posner v. Tabone (In re Posner)*, 700 F.2d 1243 (9th Cir. 1983); *In re Mellor*, 31 B.R. 151 (9th Cir. 1983); *Sambo's Restaurants, Inc. v. Wheeler (In re Sambo's Restaurants Inc.)*, 754 F.2d 811 (9th Cir. 1985); *Morgan Guaranty Trust Co. of New York v. American Savings and Loan Ass'n.*, 804 F.2d 1487 (9th Cir. 1986); *In re Stringer*, 847 F.2d 549 (9th Cir. 1988); *In Re Shamblin*, 878 F.2d 324 (9th Cir. 1989); *Meyer v. Rowen*, 181 F.2d 715 (10th Cir. 1950); *Zestee Foods, Inc. v. Phillips Foods Corp.*, 536 F.2d 334 (10th Cir. 1976); *Borg-Warner Acceptance Corp. v. Hall*, 685 F.2d 1306 (11th Cir. 1982); *Blanchette v. State of New York*, 412 F.Supp. 219 (S.D.N.Y. 1976); *Wallen v. Texas*, 667 S.W.2d 621, 623 (Tex. App. - Austin 1984, no writ); *In re Wariner*, 16 B.R. 216 (Bankr. N.D. Tex. 1981); *First National Bank v. Chitwood*, 1 B.R. 415 (Bankr. W.D.Va. 1979); *Lawler v. Lomas & Nettleton Financial Corporation*, 50 B.R. 110, 116 (Bankr. N.D. Tex. 1985); *In re Dennis*, 14 B.R. 125, 127 (Bankr. E.D. Pa. 1981); *In re Grosse*, 68 B.R. 847, 850 (Bankr. E.D. Pa. 1987); *In re Pickus*, 8 B.R. 114 (Bankr. D. Conn. 1980); *In re Eisenberg*, 7 B.R. 683 (Bankr. E.D.N.Y. 1980); *In re Ellis*, 66 B.R. 821, 823 (N.D. Ill. 1986); *In re Mangiove*, 9 B.R. 34 (Bankr. S.D. Fla. 1980); *In re Murray*, 5 B.R. 732 (Bankr. D. Md. 1980); *In re Barksdale*, 15 B.R. 731 (Bankr. W.D. Va. 1981); *In re Endres*, 12 B.R. 404 (Bankr. E.D. Wis. 1981); *In re Clark*, 69 B.R. 885, 888 (Bankr. E.D. Pa. 1987); *In re Miller*, 10 B.R. 778 (Bankr. D. Md. 1981); *In re Davis*, 74 B.R. 406 (Bankr. N.D. Ohio 1987); *In re Grosso*, 9 B.R. 815 (Bankr. N.D.N.Y. 1981); *In re Young*, 14 B.R. 809 (Bankr. N.D. Ill. 1981); *In re McLean Industries Inc.*, 76 B.R. 291, 295 (Bankr. S.D.N.Y. 1987); *In re Scott*, 24 B.R. 738 (Bankr. N.D. Ala. 1982); *In re Murphy*, 22 B.R. 663 (Bankr. D. Colo. 1982); *In re Yancy*, 23 B.R. 945 (Bankr. E.D. Mich. 1982); *United States v. Coleman American Cos. Inc. (In re Coleman American Companies, Inc.)*, 26 B.R. 825 (Bankr. D. Kan. 1983); *In re Holland*, 21 B.R. 681 (Bankr. N.D. Ind. 1982); *In re Johnson*, 18 B.R. 755 (Bankr. S.D. Ohio 1982); *In re Wallingsford's Fruit House*, 30 B.R. 654 (Bankr. D. Me. 1983); *In re Golden Plan of California, Inc.*, 39 B.R. 551 (Bankr. E.D. Cal. 1984); *In re J & L Transport, Inc.*, 47 B.R. 51 (Bankr. W.D. Wis. 1985).

decision without *en banc* consideration. *United States v. Lewis*, 475 F.2d 571, 574 (5th Cir. 1972).

The Court of Appeals opinion is of particular concern. It undermines fifty years of established law supporting the present certainty which attends the automatic stay. It treats the automatic stay as if it did not exist to begin with which creates risk and uncertainty in the administration of bankruptcy estates. It approves a creditor's unilateral dismemberment of a bankruptcy estate by removing property from the exclusive jurisdiction of the bankruptcy court without obtaining an order of the bankruptcy court, i.e., "without authority of law," and "in violation of the controlling Act of Congress." This undermines the fundamental operation of the bankruptcy system that rests on the bankruptcy court's exclusive jurisdiction over the property of the estate in its custody that is protected from disturbance by the automatic stay and places the burden on debtors to obtain judicial relief to undo violative acts.

Judge Johnson's dissent in *Sikes* is correct that the majority's conclusion "contravenes the fundamental purpose underlying the automatic stay in bankruptcy." If not overturned, the decision that violations of the automatic stay are voidable, not void, will encourage creditors to violate the automatic stay and later seek retroactive sanction for the violative act. This will destroy the automatic stay's protection of the predictable and orderly administration of property in the exclusive jurisdiction and custody of the bankruptcy court.

The present form of the automatic stay, now Bankruptcy Code Section 362, made its appearance in the Act Rules of Bankruptcy Procedure, Rules 401 and 601, as prescribed by this Court on April 24, 1973 (with the exception of an automatic stay provided in Section 148 of the former

Bankruptcy Act). Comment to Bankruptcy Code Section 362. Any slight difference between the Act and Code automatic stay would not mean a different result. This case involves the Act and *Sikes* involved the Code; in both cases, the Court of Appeals reached the same result. Hence, the fact that this is an Act case does not render it unworthy of consideration. Indeed, this case is important since it undermines the automatic stay under the Act which is the foundation for the same automatic stay under the Code.

The Advisory Committee's Note to Bankruptcy Rule 601 leaves no question as to the fundamental importance of the automatic stay's protection of the bankruptcy court's exclusive jurisdiction to deal with property in its possession from the date of bankruptcy and the requirement that the bankruptcy court's jurisdiction not be disturbed without its consent.

> The premise of the rule is that such a stay is no less needful in straight bankruptcy than in a reorganization case to protect creditors against prejudicial dismemberment and disposition of the estate before a trustee or receiver can qualify. The stay provided by this rule is to be distinguished from that provided by Rule 401, which reinforces §§ 11a, 14f(2), and 17c(4) of the Act by protecting the bankrupt against harassment and possible frustration of his right to a discharge.
>
> The first branch of subdivision (a) protects the custody of the bankruptcy court against interference by an attempt to enforce a lien, whether the attempt is by a judicial proceeding or by a nonjudicial mode of enforcement. Property is in the custody of the bankruptcy court if it is in the actual or constructive possession of the bankrupt at the date of bankruptcy. See *Ex parte Baldwin*, 291 U.S. 610, 615 (1934); *Chicago*

> *Board of Trade v. Johnson,* 264 U.S. 1, 12 (1924); *Lazarus, Michel & Lazarus v. Prentice,* 234 U.S. 263, 266-67 (1914); *Acme Harvester Co. v. Beekman Lbr. Co.,* 22 U.S. 300, 307 (1911); 1 Collier ¶ 2.62 [1] (1968); MacLachlan, *Bankruptcy* 205 (1956); Mussman & Riesenfeld, *Jurisdiction in Bankruptcy*, 13 Law & Contemp. Prob. 88, 92, 98 (1948). Insofar as such property is concerned, the rule is a substantially restricted restatement of the much quoted and applied dictum of *Mueller v. Nugent,* 184 U.S. 1, 14 (1901), that "the petition is a caveat to all the world, and in effect an attachment and injunction." Once the jurisdiction of the court has attached, any act or proceeding brought in another court to enforce a lien against such property cannot disturb the custody of the bankruptcy court without its consent. See *Isaac v. Hobbs Tie & Timber Co.,* 282 U.S. 734, 737 (1931). The automatic stay is thus a logical corollary of the bankruptcy court's exclusive jurisdiction to deal with the property of the bankrupt within its custody from the date of bankruptcy.

13 *Collier on Bankruptcy,* ¶ 601.01 (14th ed. 1975).

The Advisory Committee's Note, citing this Court's precedents, confirms that fundamental to the operation of the bankruptcy law is the exclusive jurisdiction of the bankruptcy court over property in its custody against dismemberment of the estate and the protection of all creditors. This protection is even more fundamental than the fundamental protection afforded the debtor by the stay:

> § *362. Automatic stay*
>
> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It *stops* all collection efforts, all harassment, and *all foreclosure actions.* It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy. (Our emphasis).

H.R. No. 595, 95th Cong., 1st Sess. 340-2 (1977); *Richard v. City of Chicago,* 80 B.R. 451, 453 (N.D. Ill. 1987).

The conclusion that a violation of the stay is not void but merely voidable is contrary to Bankruptcy Rule 601. Rule 601 resolved the conflict in favor of an interpretation that a violation of the stay is void, not merely voidable:

> *Subdivisions (b), (c), and (d).* Whether the enforcement of a lien against property in the bankruptcy court's custody by an act or proceeding after bankruptcy without permission of the bankruptcy court *is void* has been the subject of conflicting views by the courts and commentators . . . *This rule consists with the view that such an act or proceeding is void, but subdivision (c) recognizes that in appropriate cases the court may annul the stay so as to validate action taken during the pendency of the stay.* (Our emphasis).

13 *Collier on Bankruptcy,* ¶ 601.01 (14th ed. 1975).

The creditor must obtain the bankruptcy court's order removing the prohibition of the stay and without it, the creditor's action is void. A creditor is without the unilateral power to remove the property from the protective cocoon of the bankruptcy court's exclusive jurisdiction. However, the conclusion that a violative act is merely voidable means that somehow a creditor can unilaterally waive the automatic stay and remove property from the exclusive jurisdiction of the bankruptcy court, all without the bankruptcy court's permission.

The Court of Appeals opinion that a violation of the stay is merely voidable turns on a hypertechnical interpretation of one word, "annul." Because bankruptcy courts have the power to annul the stay (a power they did not possess in

1940 when this Court rendered its opinion in *Kalb*), the Court of Appeals in *Sikes* suggested that *Kalb* has been legislatively overruled. Such an interpretation resurrects the very conflict that Rule 601 was intended to bury.

In the face of the Advisory Committee's Note to Bankruptcy Rule 601, is it conceivable that the carry-over of the word "annul" from Rule 601 to Section 362 legislatively overruled *Kalb* so that a violation of the stay is merely voidable, not void? The word "annul" appeared in Rule 601(c) when the Advisory Committee's Note was written, stating, "This rule consists with the view that such an act . . . is *void*." This Court entered its order on April 24, 1973 approving Rule of Bankruptcy Procedure 601 in accordance with the Advisory Committee's Note, thus recognizing the efficacy of the *Kalb* axiom some thirty-three years later.

To "annul" the stay requires court action by the creditor, not the debtor. A creditor who believes that there is an extraordinary circumstance justifying annulment of the stay must request that extraordinary relief and obtain the bankruptcy court's order. In the words of the Advisory Committee's Note, "*the court* may annul the stay so as to validate action taken during the pendency of the stay." Without a court order, the violative act remains void.

"To validate" means to breathe life into that which is "invalid." A judicial act is indispensable to annul the stay; it cannot be done by the unilateral act of a mere creditor. To have permitted a creditor to do so by unilateral act, as in the instant case, is a dangerous precedent indeed.

The error in the Court of Appeals opinion can be illustrated by a discussion of *In re Oliver*, 38 B. R. 245 (Bankr. D. *Minn.*, 1984) (*"Oliver"*). *Oliver* was relied on in the *Sikes*

opinion. *Oliver* at 248 states that the court will "void" acts which violate the automatic stay. To say that the court will "void" a violative act means that the violative act is "valid" until "invalidated" by court order so that the stay would be treated as if it did not exist in the first instance. The Advisory Committee's Note to Rule 601 states the opposite: that the violative act is "void" until it is "validated" by court order, not the other way around.

The Court of Appeals holding that actions taken in violation of the stay are "voidable" has ramifications far more serious than the Court of Appeals apparently realized. The law recognizes, "[t]hat which is voidable operates to accomplish the thing sought to be accomplished, until the fatal vice in the transaction has been judicially ascertained and declared." *Slaughter v. Qualls,* 162 S.W.2d 671, 674 (Tex. 1942). A voidable act places on the party entitled to avoid the transaction an affirmative duty to act to obtain a judicial determination of voidness, *Great American Reserve Ins. Co. v. Strain,* 377 P.2d 583, 587 (Okla. 1962), giving the presumption of legitimacy to the transaction and placing the burden of proving otherwise on the debtor. Fearing the possible legitimacy of the creditor's violative action, the debtor must then seek affirmative relief in the bankruptcy court to obtain a ruling that the action was void. This procedure creates the very pressure and expense that the automatic stay was designed to prevent.

Treating actions taken in violation of the stay as voidable causes very profound practical problems. For example, if a creditor induces a court to issue a judgment in violation of the stay and the action is treated as voidable, it can be attacked only on direct appeal; a void court order, by contrast, is always subject to collateral attack. Under Section

2-403 of the Uniform Commercial Code, one who acquires voidable title has the power to transfer good title to a good faith purchaser for value, which could deprive a debtor of any interest in goods if a creditor acquires voidable title by violating the stay.

Under the decision, the creditors who chose to violate the law by violating the automatic stay as if the stay did not exist were treated more favorably than a creditor who abided by the law and honored the automatic stay.

The seriousness of treating the stay as if it did not exist to begin with should be evident.

> Violation of a Section 362 stay is a serious matter which should not be disregarded, let alone approved, without compelling reason. Any breach in this concept will only create precedent for further breaches. Eventually, a situation will come about, as a result of incremental rulings, where any creditor may contend that there is sufficient precedent so as to have warranted litigating in another court despite the stay. The creditor may thus proceed calculating that subsequent litigation in bankruptcy court could effect not only lifting of the stay but also remission of and retroactive sanction for violation of the Section 362 stay. Ingenious counsel can always extrapolate from precedent to a particular matter. It is therefore a reasonable prospect, given this case, that considerable such precedent may develop, thereby attenuating the present certainty which attends the Section 362 stay.

As to existing precedent, the action of appellee is void. E.g., *Kalb v. Feuerstein,* 308 U.S. 433, 60 S.Ct. 343, 84 L.Ed. 370 (1940); *Borg-Warner Acceptance Corp. v. Hall,* 685 F.2d 1306, 1308 (11th Cir. 1982) ("Actions taken in violation of the automatic stay are void and without effect"). See also 2 Collier (15th Ed.) Section

> 362.11; Kennedy, *The Automatic Stay in Bankruptcy*, 11 Journal of Law Reform 177 (1978) . . . .

In re Mellor, 31 B.R. 151, 155 (9th Cir. Bankr. 1983) (Volinn, J., dissenting).

The Court of Appeals opinion in the instant case is contrary to the great weight of authority and relies on *Sikes*. In turn, *Sikes* relies on the four out-of-step cases of *In re Fuel Oil Supply and Terminaling, Inc.*, 30 B.R. 360 (Bankr. N.D. Tex. 1983) ("*Fuel Oil*"); *In re Brooks*, 79 B.R. 479 (9th Cir. Bankr. 1987) ("*Brooks*"); *In re Sapp*, 91 B.R. 520 (Bankr. E.D. Mo. 1988) ("*Sapp*"); and *Oliver*. These four decisions hold that violations of the automatic stay are merely voidable, not void, which is contrary to the purpose of Bankruptcy Rule 601 to resolve the conflict in favor of void, not merely voidable. 2 *Collier on Bankruptcy* ¶ 362.11 (15th ed. 1988). The following is a brief discussion of these four cases.

After *Brooks*, the Ninth Circuit has held twice that violations of the automatic stay are void, citing *Kalb. In Re Shamblin*, 878 F.2d 324, 327 (9th Cir. 1989); *In re Stringer*, 847 F.2d 549, 551 (9th Cir. 1988). In *In re Stringer*, the Ninth Circuit recognized that there are "several narrow exemptions" to the automatic stay, leaving non-exempt acts as void, not merely voidable.

Brooks and *Oliver* relied on *Fuel Oil*. Bankruptcy Judge Flowers decided *Fuel Oil*. However, Judge Flowers in another case held that actions in violation of the stay are void *ab initio* whether the creditor acts with knowledge of the stay or not. *In re Wariner*, 16 B.R. 216 (Bankr. N.D. Tex. 1981). *Fuel Oil* and *Oliver* incorrectly limit the purpose of the stay to simply debtor protection and hold in effect

that the debtor can waive the stay. As previously pointed out, the Rule 601 stay protects not only the debtor, but even more fundamentally it protects property in the bankruptcy court's jurisdiction and the creditors. The debtor cannot unilaterally waive the automatic stay; an order of the bankruptcy court is required. *Commerzanstalt v. Telewide Systems, Inc.*, 790 F.2d 206, 207 (2d Cir. 1986); *Association of St. Croix Condominium Owners v. St. Croix Hotel Corp.*, 682 F.2d 446, 448 (3d Cir. 1982).

And, *Sapp* (citing *Brooks*) starts from a false premise by incorrectly stating, "Although there is some disagreement among the courts, it is generally accepted that actions taken in violation of the automatic stay are not void but voidable," contrary to the weight of authority and the express resolution of the conflict by Rule 601 that a stay violation is "void."

Thus, the four decisions relied on by *Sikes* are not sound authority.

Next, *Sikes* is factually distinguishable from the instant case. *Sikes* involved an interpretation of the intent of bankruptcy court orders entered after Mr. and Mrs. Sikes promptly sought relief from the automatic stay. In this case, Respondents never sought relief from the automatic stay, so there was no order affecting the stay to interpret.

The Court of Appeals opinion in *Sikes* also mistakenly cites 11 U.S.C. secs. 542(c) and 549 as authority that "the Bankruptcy Code specifically protects certain actions taken in violation of the stay." 881 F.2d at 179. Section 542(c) merely protects a transferor, acting without knowledge of the stay, from liability; it does not validate the transfer. Section 549 protects transferees acting without knowledge of the bankruptcy, as well as empowers the trustee to bring

actions against recalcitrant transferees that will not return property to the estate. The Court of Appeals misconstrues the applicability of these sections to the voidness issue, failing to recognize them as at most narrow, statutorily-defined exemptions. *See Richard v. City of Chicago*, 80 B.R. at 454.

Turning to Petitioner's Chapter XI, Bankruptcy Judge Ford in the Chapter XI, in *Lawler v. Lomas & Nettleton Financial Corporation*, 50 B.R. 110, 116 (Bankr. N.D. Tex. 1985), stated in respect to attempted foreclosures in violation of the automatic stay:

> . . . of course, the foreclosures would have been in violation of the automatic stay, and therefore void *ab initio*, and an action to try title would thus lie, Defendants and their assigns being naught but mere trespassers.

Respondents are mere trespassers if their foreclosure in violation of the automatic stay is void *ab initio*.

Respondents "acquired no title or other interest" in Petitioner's properties in the face of the automatic stay enjoining all persons from seizing or in any manner converting the properties of the debtor, Petitioner. *Blanchette v. State of New York*, 412 F. Supp. 219, 222 (S.D.N.Y. 1976). The property was within the custody of the Bankruptcy Court and Respondents' unilateral act, without an order of the Bankruptcy Court modifying the stay, was ineffective to remove the property from the Bankruptcy Court's custody and jurisdiction. Respondents, having no title, are mere trespassers.

Before Petitioner's plan was confirmed, Petitioner, a bankrupt, did not have funds independent of the Bankruptcy Court to pay or retain lawyers in the wrongful foreclosure actions. Petitioner was obliged to give his bankruptcy trustee a reasonable time to "fish or cut bait"

before Petitioner filed his application. That is, a trustee must be accorded a reasonable period of time for investigation, but there comes a time when he must "fish or cut bait." To permit a trustee to assert his title to an asset against the bankrupt, to do nothing to realize on it and yet forever prevent the bankrupt from doing so, would be wholly contrary to the policy of the bankruptcy law. *In re Ira Haupt & Co.*, 280 F. Supp. 336, 340 (S.D.N.Y. 1967), *aff'd*, 390 F.2d 251, 254 (2d Cir. 1968).

On May 22, 1981, Petitioner filed his application to employ counsel to pursue the wrongful foreclosure action against Respondents since the trustee would not "fish or cut bait." Bankruptcy Judge Gandy noted that the only "dilatory" action and "foot dragging" was by the Bankruptcy Court, not Petitioner, and any statute of limitations had been tolled.

Contrary to Bankruptcy Judge Gandy's ruling that any statutes of limitations were tolled, a subsequent Bankruptcy Judge applied the Texas statute of limitations to Petitioner. The effect of concluding that Respondents' violation of the stay was merely voidable and the corresponding application of the Texas four-year statute of limitations without regard to the legal delay attributable to and inherent in the administration of the bankruptcy laws is that Petitioner should have filed his application on or before May 3, 1981. Instead, Petitioner filed on May 22, 1981 — nineteen days too late under the Texas four-year statute of limitations.

There is no justification for a rule that would bar a meritorious action as untimely because of a trustee's delay, a congested court docket, and other circumstances over which Petitioner had absolutely no control. The time during which Petitioner was prevented from proceeding by the paramount authority of the Bankruptcy Court should not be counted against him in determining limitations, if any. *Wagner v. New York, Ontario and Western Railway*, 146 F.Supp. 926,

928-929 (M.D. Pa. 1956); *Doneghy v. Texas*, 334 S.W.2d 506, 509 (Tex. Civ. App. — Amarillo 1960). Equitable principles are designed to avoid disadvantage by legal delays attributable to the time-consuming procedures inherent in the administration of the bankruptcy laws. *Nicholas v. United States*, 384 U.S. 678, 683 (1966).

The law is or should be that no state statute of limitations can bar the filing of a complaint to preserve the integrity of the bankruptcy court's jurisdiction and property in its possession. Otherwise, the stay would not remain effective during the pendency of the case, but would expire without an order of the bankruptcy court upon the running of a state statute of limitations after a creditor violates the stay. Bankruptcy Rule 601 and its successor in the Bankruptcy Code do not provide for this. Specifically, Rule 601(b) provides for the "duration of the stay" to be that the stay shall continue until the case is dismissed or closed, or until the property subject to the lien is, with the approval of the court, set apart as exempt, abandoned, or transferred, or when the stay is lifted, terminated, annulled, or otherwise modified by the bankruptcy court. None of these events limiting the duration of the stay occurred in this case.

Simply, there is no statute of limitations to bar a complaint to protect property that remains in the jurisdiction of the bankruptcy court. Like the automatic stay, this is a logical corollary of the bankruptcy court's exclusive jurisdiction to deal with the property of the bankrupt within its custody from the date of the bankruptcy unless sooner modified by the court.

The drafters of the Constitution recognized the importance of establishing a uniform bankruptcy law throughout the United States and granted this power to Congress. U.S. Const. art. I, sec. 8, cl. 18. A system of bankruptcy under

federal statutes has a beneficent effect upon interstate commerce providing one uniform system of rights and remedies governing the relations of debtors and creditors in the event of business failure. 9 Am. Jur. 2d *Bankruptcy* secs. 3, 4, and 1287 (1963 — volume relating to Act). To permit inconsistent state statutes of limitations to control when property may come and go from the jurisdiction of the bankruptcy court is not consistent with the purpose of one uniform system of rights and remedies under a uniform system of bankruptcy law in the United States.

The Bankruptcy Act is paramount. States are without authority to make laws which deal with a phase of the subject of bankruptcies as covered by the Act. 9 Am. Jur. 2d *Bankruptcy* sec. 11 (1963 — volume relating to Act). The cases are legion holding that federal bankruptcy law is superior and paramount. *Eg., International Shoe Co. v. Pinkus,* 278 U.S. 261 (1929). Congress intended the bankruptcy court to have exclusive jurisdiction without providing a federal statute of limitations applicable to violations of the automatic stay during the pendency of a bankruptcy proceeding.

A phase of the statutes of limitations was covered by Act Section 11e. The issue here as to whether a violation of the automatic stay is void or merely voidable arose because of the Court of Appeals' misapplication of Section 11e.

First, Section 11e is phrased in terms of the *trustee's* ability to bring an action within the longer of two years from the date of adjudication or the expiration of a limitations period provided by nonbankruptcy law. The Court of Appeals misunderstood Petitioner's role. Petitioner was a debtor but *not* a debtor-in-possession or trustee, a trustee having been appointed. In a Chapter XI, a debtor is considered to be the trustee only when there is no trustee since the

debtor is then a debtor-in-possession. Section 11e is inapplicable to Petitioner since he was neither the trustee nor the debtor-in-possession.

Second, Section 11e only applies to actions which are based on transactions occurring prior to bankruptcy, i.e., pre-petition. An attempted wrongful foreclosure in violation of the stay by definition can only occur post-petition. 9 Am. Jur. 2d *Bankruptcy* sec. 1163, p. 865 (1963 — volume relating to Act). Petitioner's complaint was entirely new and original, i.e., not existing at the time of the filing of the petition in bankruptcy. It, like in *Burnham v. Todd,* 139 F.2d 338 (5th Cir. 1943), involved a summary proceeding to recover property wrongfully taken from the custody of the Bankruptcy Court post-petition since Respondents' foreclosure occurred post-petition.

Burnham v. Todd, 139 F.2d at 343, states:

> Since no federal limitation exists, the next question is whether a Texas statute of limitation applies. The possible question whether Congress intended Section 11 to supersede State limitation statutes except as it in its amended form recognizes them has not been raised.

In the instant case, Petitioner raised the issue as to whether Congress intended Section 11 to supersede state statutes of limitations. Petitioner says it does. Congress, by enacting a specific limitation period under Section 11e, covers the same subject matter as the Texas statutes of limitations. Since Section 11e does not provide a limitation period for declaring a post-petition foreclosure sale void *ab initio* for property in the custody of a bankruptcy court, no limitation period exists.

If the Court of Appeals is correct that a Texas statute of limitations period is applicable, then state law would interfere and conflict with the paramount power of the

bankruptcy courts over property in their jurisdiction. That is, a bankruptcy court could not enter orders in respect to property in its custody if a creditor violates the automatic stay and no action is taken within the time prescribed by a state statute of limitations. Such a result is inconsistent with the paramount federal power of the bankruptcy courts over property in its custody.

In *In re Hillcrest Lumber Co.*, 187 F. Supp. 304 (E.D.N.Y. 1959), the court refused to apply Section 11e to a bankruptcy proceeding by a debtor to direct a lien claimant to pay debtor certain sums, stating that the sums were subject to the continuing summary jurisdiction of the court. Also, in *Berman v. Provencher*, 614 F.2d 823, 825 (1st Cir. 1980), the court, *citing Burnham v. Todd*, 139 F.2d at 338, held that Section 11e does not bar a post-petition claim against the bankrupt for assets improperly concealed or misstated on the schedules.

The Bankruptcy Court and Respondents incorrectly relied on *Herget v. Central National Bank & Trust Co.*, 324 U.S. 4 (1945) ("*Herget*"). *Herget* is distinguishable because it is a pre-petition preference action. The instant case is neither a preference action nor a pre-petition action. Rather, it is a post-petition action based on a creditor's post-petition foreclosure in violation of the automatic stay. In the District Court, Respondents' brief, on page 9, admits that *Herget* is based on a transaction "prior to bankruptcy" since "the operative facts of the preference occurred pre-petition." By definition, under Section 60(a)(1) of the Act, a "preference" is a transfer that occurred "within four months *before* the filing" of the bankruptcy petition. Thus, Petitioner correctly distinguishes *Herget* since *Herget* is a preference case based upon a transfer occurring prior to bankruptcy and Petitioner's complaint against Respondents is based upon Respondents' post-petition wrongful foreclosure.

In the District Court, Respondents also incorrectly attempted to discredit Petitioner's authorities by referring to Section 11d as being "superseded by Section 11(e)." Section 11d of the Act (formerly at 11 U.S.C.§29) appears as amended in 1938 in Section 11e. The provisions are comparable since the substance of the first sentence of the Section 11e subdivision was taken from the former Section 11d subdivision, and only the duration of the limitations was altered and the application clarified. 9 *Collier on Bankruptcy*, ¶ 11.12(2) (14th ed. 1977). Accordingly, Petitioner's authorities under Section 11d are precedential as to Section 11e and are consistent with this Court's decisions on the comparable part of the Bankruptcy Act of 1867, Section 2. *Dushane v. Beall*, 161 U.S. 513 (1896); *Hammond v. Whittredge*, 204 U.S. 538 (1907); *Yazoo & Miss. R.R. Co. v. Brewer*, 231 U.S. 245 (1913). Therefore, *Herget* is *in apropos*.

Hence, Section 11e is inapplicable, not only to a debtor but also to a trustee or a debtor-in-possession, as to post-petition actions of a creditor in violation of the automatic stay.

By applying Section 11e, the Court of Appeals was required to determine what state statute of limitations applies since the Court of Appeals determined that there was no applicable federal statute of limitations. If Respondents' violation of the automatic stay was void, then the ten-year Texas statute of limitations would apply since Respondents would be mere trespassers. On the other hand, if Respondents' violation of the automatic stay was merely voidable, then the four-year Texas statute of limitations would apply since Respondents acquired good title until invalidated.

Assuming, *arguendo*, if a Texas statute of limitations does apply, the correct Texas statute of limitations would be the

ten-year statute of limitations applicable to the recovery of property. Petitioner proceeded within ten years of the date of the improper foreclosure, so his action was not barred by the Texas four-year statute of limitations.

The Texas Supreme Court has held that despite the fact that a trustee's deed was regular on its face and apparently conferred good title on the purchaser, the plaintiff was allowed to go behind the deed and show the lack of authority to make the sale. And, it held that where there was a lack of authority to make the sale, the foreclosure sale and the deed were absolutely void because the trustee never had the power to convey the land. *Slaughter v. Qualls,* 162 S.W.2d at 675.

Respondents' trustee under the deed of trust was without authority to conduct a foreclosure sale since neither Respondents nor their trustee obtained the consent of the Bankruptcy Court to foreclose on the property in its jurisdiction. The Texas case, *Claude Regis Vargo Enterprises v. Bacarisse,* 578 S.W.2d 524 (Tex. Civ. App. — Houston [14th Dist.] 1979, writ ref'd n.r.e.), decided under Bankruptcy Rule 601, addressed the issue of whether a foreclosure sale under a deed of trust is void for lack of authority. The court held that under Rule 601 the sale was invalid, although there was a subsequent lifting of the stay which validated the sale. The Texas court of appeals cited the Advisory Committee's Note to Rule 601.

Nevertheless, the Court of Appeals decided that the Respondents' violation of the automatic stay was merely voidable and applied the four-year Texas statute of limitations, permitting the dismemberment of the estate by a unilateral act of Respondents without an order of the Bankruptcy Court lifting, terminating, annulling, or other-

wise modifying the stay. Heretofore, such a unilateral act by a creditor would have been treated far more seriously.

The foregoing demonstrates the serious implications of determining that Respondents' act in violation of the automatic stay was merely voidable, not void.

Accordingly, Petitioner respectfully suggests that the Court of Appeals opinion is in error, that an action in violation of the automatic stay is void, that no statute of limitations applies to deprive a bankruptcy court of the jurisdiction of property within its exclusive jurisdiction, and that Petitioner's complaint was not barred since no statute of limitations applied or, in the alternative, the ten-year statute of limitations had not expired in respect to the void act.

CONCLUSION

Because of the fundamental importance of the automatic stay to the administration of all bankruptcy estates, Petitioner respectfully requests that this Court issue a writ of certiorari to review the judgment of the Court of Appeals, that the judgment of the Court of Appeals be reversed and judgment rendered that Respondents' foreclosure in violation of the automatic stay was void, or, in the alternative, determine that violations of the automatic stay are void and remand with instructions consistent therewith, and for such other and further relief to which Petitioner is justly entitled.

Respectfully submitted,
WESNER COKE BOYD & CLYMER, P.C.

By _____
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CERTIFICATE OF SERVICE

I hereby certify that 3 copies of this Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and the Appendix have been served upon Respondents, Theodore A. and Mary Paulissen, by depositing the copies in the United States mail with first-class postage prepaid, addressed to Respondents' counsel of record, Judith Elkin, Esq., Haynes and Boone, 3100 NCNB Plaza, 901 Main Street, Dallas, Texas 75202, on January 9, 1990.

All parties required to be served have been served.

C. Thomas Wesner, Jr.

89-1096

Supreme Court, U.S.
FILED
JAN 10 1990
JOSEPH F. SPANIOL, JR.
CLERK

NO.

In The

Supreme Court Of The United States

OCTOBER TERM, 1989

IN THE MATTER OF: H. ROGER LAWLER, ETC., *Debtor.*

H. ROGER LAWLER,
Petitioner,
vs

THEODORE A. PAULISSEN, et ux.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

APPENDIX

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January 1990

U.S. COURT OF APPEALS
FILED
AUG 21 1989
GILBERT F. GANUCHEAU
Clerk

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 88-1738

D.C. Docket No. CA-3-87-2343-G

IN THE MATTER OF: H. ROGER LAWLER, ETC., *Debtor,*

H. ROGER LAWLER,
Appellant,

versus

THEODORE A. PAULISSEN,
Appellee.

Appeal from the United States District Court for the Northern District of Texas

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Before REAVLEY, POLITZ, and SMITH, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the District Court in this cause is affirmed.

IT IS FURTHER ORDERED that appellant pay to appellee the costs on appeal, to be taxed by the Clerk of this Court.

August 21, 1989

ISSUED AS MANDATE:

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 88-1738

IN THE MATTER OF: H. ROGER LAWLER, ETC., *Debtor,*

H. ROGER LAWLER,

Appellant,

versus

THEODORE A. PAULISSEN,

Appellee.

Appeal from the United States District Court for the Northern District of Texas (CA-3-87-2343-G)

(August 21, 1989)

Before REAVLEY, POLITZ, and SMITH, Circuit Judges.

POLITZ, Circuit Judge:*

H. Roger Lawler filed suit against Theodore and Mary Paulissen, alleging that the Paulissens violated an automatic stay in bankruptcy. The district court concluded that Lawler's complaint was time barred by a four-year limitation provision under Texas law and, accordingly, granted summary judgment in favor of the Paulissens. For the reasons assigned, we affirm.

* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

Background

In 1974 Lawler purchased 15 acres of property in Collin County, Texas from the Paulissens, giving a promissory note and executing a deed of trust which was duly recorded. On January 9, 1976 an involuntary petition in bankruptcy was filed against Lawler. This filing was prior to the present Bankruptcy Code and the issues presented are resolved pursuant to the Bankruptcy Act of 1898, as amended. With the filing of the petition an automatic stay became effective with respect to all of Lawler's property, pursuant to Rules 401 and 601 of the prior Rules of Bankruptcy Procedure. Lawler subsequently defaulted on his note to the Paulissens and on May 3, 1977 the trustee foreclosed and the Paulissens reacquired title in satisfaction of the debt. On January 20, 1978 Lawler consented to an adjudication in bankruptcy and the case continued as a Chapter XI proceeding.

On May 22, 1981 Lawler filed an application with the bankruptcy court to permit him to retain counsel to proceed against persons alleged to have held foreclosure sales in violation of the bankruptcy stay. The application stated that the trustee in bankruptcy had informed Lawler that he did not intend to prosecute these causes of action but that he had no objection to Lawler pursuing them. Although hearings were held in June and July of 1981 it does not appear from the record that the court ever ruled on the application. Nevertheless, Lawler's plan of arrangement under Chapter XI gave him the sole right to assert and prosecute any and all claims and causes of action against third parties, whether owned or held by the debtor or by the trustee.

On December 13, 1983 Lawler filed a complaint against the Paulissens alleging that the foreclosure on the Collin County property violated the automatic stay. Lawler sought a declaration that the foreclosure was null and void and he prayed for an order directing the Paulissens to convey the property back to the bankruptcy estate. Alternatively, Lawler sought judgment in the amount of the current fair market value of the property. Finding Lawler's complaint barred by the Texas four-year statute of limitations, the

bankruptcy court granted summary judgment in favor of the Paulissens. Lawler appeals from the district court's affirmance of the order of the bankruptcy court.

Analysis

The sole issue on appeal is whether Lawler's suit against the Paulissens is time barred. Section 11(e) of the Bankruptcy Act of 1898, formerly codified at 11 U.S.C. §29(e), provided in pertinent part:

> A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy.

Although section 11(e) speaks only to the rights of a receiver or trustee, the provision is applicable to Lawler, who is a debtor in possession under Chapter XI of the 1898 Act. *See Schokbeton Industries, Inc. v. Schokbeton Products Corp.*, 466 F.2d 171 (5th Cir. 1972).

Under the terms of section 11(e) Lawler's claim for violation of the automatic stay was timely if filed within two years of his adjudication in bankruptcy or within such further period of time as permitted by federal or state law. Because Lawler's complaint was filed more than two years after his adjudication in bankruptcy, his suit can proceed only if it was brought within an additional period of time permitted by federal or state law.

There is no federal statute of limitations applicable to a suit alleging a violation of the automatic stay in bankruptcy under the 1898 Act. It is well established, however, that when Congress has not provided a period of limitation federal courts will use the applicable statute of limitations of the forum state. *McMillian v. City of Rockmart*, 653 F.2d 907 (5th Cir. 1981) (citing *O'Sullivan v. Felix*, 233 U.S. 318 (1914)). To determine the applicable state statute

of limitations, "[t]he court must first determine the essential nature of the federal claim before it, and then look to state law in order to determine which state statute is applicable to claims similar to the one before the court." *Id.* at 909.

The nature of Lawler's suit against the Paulissens is that of an action of trespass to try title which, under Texas law, is "any suit that involves a dispute as to the title to land . . . , regardless of its form, and regardless of the character of the right or interest asserted, whether legal or equitable." 61 Tex. Jur.3d *Quieting Title* §37 (1988) (collecting cases). Texas law provides a four-year limitations period for an action of trespass to try title where the deed is voidable, Tex.Rev.Civ.Stat.Ann. art. 5529. In *Slaughter v. Qualls*, 139 Tex. 340, 162 S.W.2d 671, 674 (Tex. 1942), the Texas Supreme Court declared:

> The rule has long been established in this State that where a deed is absolutely void, a suit at law in trespass to try title may be maintained to recover the land without setting the deed aside, and the statutes of limitations governing actions for the recovery of land apply. On the other hand, where a deed is merely voidable and the equity powers of the court must first be invoked to cancel the deed before a suit can be maintained at law to recover the land, the four-year statute, Art. 5529, R.C.S. 1925, controls.
>
> * * *
>
> The question whether the trustee's deed is void or voidable depends on its effect upon the title at the time it was executed and delivered. If it was a mere nullity, passing no title and conferring no right whatsoever, it was absolutely void, but if it passed title to . . . the purchaser, subject only to the right of [the plaintiff] to have it set aside upon proof that the sale was improperly made, then it was merely voidable.

To determine whether the four-year period applies to Lawler's suit against the Paulissens, it is necessary to decide whether actions taken in violation of an automatic stay in bankruptcy are void or voidable under the 1898 Act. We

recently answered this question with respect to the automatic stay provision of the Bankruptcy Code of 1978, 11 U.S.C. §362(a), holding that such violations are voidable. *Sikes v. Global Marine,* ____ F.2d ____, docket number 88-2160. That conclusion was compelled by the bankruptcy court's power to annul a stay under the 1978 Code, 11 U.S.C. §362(d). We noted: "The power to annul authorizes retroactive relief even unto the date of the filing of the petition giving rise to the automatic stay [and] authorizes the court to validate actions taken subsequent to the impressing of the section 362(a) stay." ____ F.2d at ____.

Rules 401 and 601 of the Rules of Bankruptcy Procedure authorized the bankruptcy court to annul an automatic stay under the 1898 Act. In light of the court's authority to grant relief which had a retroactive effect, we are persuaded that actions taken in violation of an automatic stay under the 1898 Act are properly characterized as voidable, not void.[1] Because we find such actions voidable, article 5529 controls under Texas law. Lawler's cause of action against the Paulissens accrued on May 3, 1977, the date of the foreclosure sale. His complaint was filed on December 13, 1983, more than four years later. Therefore, even applying the longer period of time permitted by state law, Lawler's suit was not timely filed.[2]

The judgment of the district court is AFFIRMED.

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[1]We are cognizant that in *Kalb v. Feuerstein,* 308 U.S. 433, 438 (1940), the Supreme Court held that a foreclosure action conducted in violation of an automatic stay in bankruptcy under the 1898 Act was "beyond [the court's] power, void, and subject to collateral attack." *Kalb* was decided in 1940, prior to the adoption of the Rules of Bankruptcy Procedure, which granted the power to annul. We therefore do not find the *Kalb* decision controlling.

[2]We find no merit in Lawler's assertion that the statute of limitations should be tolled due to the bankruptcy court's "foot dragging" with respect to his application to employ special counsel to proceed against the Paulissens and other parties alleged to have violated the automatic stay. The four-year statute of limitations under Texas law had already expired at the time Lawler filed that application on May 22, 1981. Thus, tolling the statute during the period in which the bankruptcy court delayed in acting upon Lawler's application would provide Lawler no surcease.

U.S. COURT OF APPEALS
FILED
OCT 12 1989
GILBERT F. GANUCHEAU
Clerk

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 88-1738

IN THE MATTER OF: H. ROGER LAWLER, ETC., *Debtor,*

H. ROGER LAWLER,
Appellant,

versus

THEODORE A. PAULISSEN,
Appellee.

Appeal from the United States District Court for the Northern District of Texas

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ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC

(Opinion August 21, 1989, 5 Cir., 198_, _____. F.2d _____)
(October 12, 1989)

Before REAVLEY, POLITZ and SMITH, Circuit Judges.

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestion for Rehearing En Banc is DENIED.

* * *

ENTERED FOR THE COURT:

s/ Henry A. Politz
United States Circuit Judge

APPENDIX C

Rule 401.

PETITION AS AUTOMATIC STAY OF CERTAIN ACTIONS ON UNSECURED DEBTS

(a) Stay of Actions. The filing of a petition shall operate as a stay of the commencement or continuation of any action against the bankrupt, or the enforcement of any judgment against him, if the action or judgment is founded on an unsecured provable debt other than one not dischargeable under clause (1), (5), (6), or (7) of § 17a of the Act.

(b) Duration of Stay. Except as it may be deemed annulled under subdivision (c) or may be terminated, annulled, or modified by the bankruptcy court under subdivision (d) or (e) of this rule, the stay shall continue until the bankruptcy case is dismissed or the bankrupt is denied a discharge or waives or otherwise loses his right thereto.

(c) Annulment of Stay. At the expiration of 30 days after the first date set for the first meeting of creditors, the stay provided by this rule shall be deemed annulled as against any creditor whose debt has not been duly scheduled and who has not filed his claim by that time.

(d) Relief from Stay. Upon the filing of a complaint by a creditor seeking relief from a stay provided by this rule, the bankruptcy court shall set the trial for the earliest possible date, and it shall take precedence over all matters except older matters of the same character. The court may, for cause shown, terminate, annul, modify, or condition such stay.

(e) Availability of Other Relief. Nothing in this rule precludes the issuance of, or relief from, any stay, restraining order or injunction when otherwise authorized.

Rule 601.

PETITION AS AUTOMATIC STAY AGAINST LIEN ENFORCEMENT

(a) Stay Against Lien Enforcement. The filing of a petition shall operate as a stay of any act or the commencement or

continuation of any court proceeding to enforce (1) a lien against property in the custody of the bankruptcy court, or (2) a lien against the property of the bankrupt obtained within 4 months before bankruptcy by attachment, judgment, levy, or other legal or equitable process or proceedings.

(b) Duration of Stay. Except as it may be terminated, annulled, or modified by the bankruptcy court under subdivision (c), (d), or (e) of this rule, the stay shall continue until the bankruptcy case is dismissed or closed, or until the property subject to the lien is, with the approval of the court, set apart as exempt, abandoned, or transferred.

(c) Relief from Stay. On the filing of a complaint seeking relief from a stay provided by this rule, the bankruptcy court shall, subject to the provisions of subdivision (d) of this rule, set the trial for the earliest possible date, and it shall take precedence over all matters except older matters of the same character. The court may, for cause shown, terminate, annul, modify, or condition such stay. A party seeking continuation of a stay against lien enforcement shall show that he is entitled thereto.

(d) Ex Parte Relief from Stay. Upon the filing of a complaint seeking relief from a stay provided by this rule, relief may be granted without written or oral notice to the adverse party if (1) it clearly appears from specific facts shown by affidavit or by a verified complaint that immediate and irreparable injury, loss, or damage will result to the plaintiff before the adverse party or his attorney can be heard in opposition, and (2) the plaintiff's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. The party obtaining relief under this subdivision shall give written or oral notice thereof as soon as possible to the trustee or receiver or, if none has qualified, to the petitioner or petitioners and, in any event, shall forthwith mail to such person or persons a copy of the order granting relief. On 2 days' notice to the party who obtained relief from a stay provided by this rule

without notice or on such shorter notice to the party as the court may prescribe, the adverse party may appear and move its reinstatement, and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require.

(e) Availability of Other Relief. Nothing in this rule precludes the issuance of, or relief from, any stay, restraining order, or injunction when otherwise authorized.

Rule 4001.
RELIEF FROM AUTOMATIC STAY; USE OF CASH COLLATERAL; OBTAINING CREDIT; AGREEMENTS

(a) Relief from Stay.

(1) Motion. A motion for relief from an automatic stay provided by the Code shall be made in accordance with Rule 9014.

(2) Final Hearing on Stay. The stay of any act against property of the estate under § 362(a) of the Code expires 30 days after a final hearing commenced pursuant to § 362(e) unless before that time expires the court denies the motion for relief from the stay or, after notice and a hearing, orders the stay continued pending conclusion of the final hearing.

(3) Ex Parte Relief From Stay. Relief from a stay under § 362(a) may be granted without prior notice to the adverse party only if (A) it clearly appears from specific facts shown by affidavit or by a verified motion that immediate and irreparable injury, loss, or damage will result to the movant before the adverse party or the attorney for the adverse party can be heard in opposition, and (B) the movant's attorney certifies to the court in writing the efforts, if any, which have been made to give notice and the reasons why notice should not be required. The party obtaining relief under this subdivision and § 362(f) shall immediately give oral notice thereof to the trustee or debtor in possession and to the debtor and forthwith mail

or otherwise transmit to such adverse party or parties a copy of the order granting relief. On two days notice to the party who obtained relief from the stay without notice or on shorter notice to that party as the court may prescribe, the adverse party may appear and move reinstatement of the stay. In that event, the court shall proceed expeditiously to hear and determine the motion.

(b) Use of Cash Collateral.

(1) Motion; Service. A motion for authorization to use cash collateral shall be made in accordance with Rule 9014 and shall be served on any entity which has an interest in the cash collateral, on any committee appointed under the Code or its authorized agent, or, if no committee has been appointed, on the creditors included on the list filed pursuant to Rule 1007(d) and on such other entities as the court may direct.

(2) Hearing. The court may commence a final hearing on a motion for authorization to use cash collateral no earlier than 15 days after service of the motion. If the motion so requests, the court may conduct a preliminary hearing before such 15 day period expires, but the court may authorize the use of only that amount of cash collateral as is necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

(3) Notice. Notice of hearing pursuant to this subdivision shall be given to the parties on whom service of the motion is required by paragraph (1) of this subdivision and to such other entities as the court may direct.

(c) Obtaining Credit.

(1) Motion; Service. A motion for authority to obtain credit shall be made in accordance with Rule 9014 and shall be served on any committee appointed under the Code or its authorized agent, or, if no committee has been appointed, on the creditors listed on the list filed pursuant to Rule 1007(d), and on such other entities as the court may direct. The motion shall be accompanied by a copy of the agreement.

(2) Hearing. The court may commence a final hearing on a motion for authority to obtain credit no earlier than 15 days after service of the motion. If the motion so requests, the court may conduct a hearing before such 15 day period expires, but the court may authorize the obtaining of credit only to the extent necessary to avoid immediate and irreparable harm to the estate pending a final hearing.

(3) Notice. Notice of hearing pursuant to this subdivision shall be given to the parties on whom service of the motion is required by paragraph (1) of this subdivision and to such other entities as the court may direct.

(d) Agreement Relating to Relief from the Automatic Stay, Providing Adequate Protection, Use of Cash Collateral, and Obtaining Credit.

(1) Motion, Service. A motion for approval of an agreement to provide adequate protection, for the modification or termination of the stay provided for in § 362, for the use of cash collateral, or for approval of an agreement between the debtor and an entity that has a lien or interest in property of the estate pursuant to which the entity consents to the creation of a lien senior or equal to the entity's lien or interest in such property shall be served on any committee appointed under the Code or its authorized agent, or, if no committee has been appointed, on the creditors listed on the list filed pursuant to Rule 1007(d) and on such other entities as the court may direct. The motion shall be accompanied by a copy of the agreement.

(2) Objection. Notice of the motion and the time within which objections may be filed and served on the debtor in possession or trustee shall be mailed to the parties on whom service is required by paragraph (1) of this subdivision and to such other entities as the court may direct. Unless the court fixes a different time, objections may be filed within 15 days of the mailing of notice.

(3) Disposition; Hearing. If no objection is filed, the court may enter an order approving or disapproving the agreement without conducting a hearing. If an objection is filed or if the court determines a hearing is appropriate, the court shall hold a hearing on no less than five days' notice to the objector, the movant, the parties on whom service is required by paragraph (1) of this subdivision and such other entities as the court may direct.

SECTION 362 (11 U.S.C. §362)

§ 362. Automatic stay.

(a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title, or an application filed under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), operates as a stay, applicable to all entities, of —

(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other action or proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title;

(2) the enforcement, against the debtor or against property of the estate, of a judgment obtained before the commencement of the case under this title;

(3) any act to obtain possession of property of the estate or of property from the estate or to exercise control over property of the estate;

(4) any act to create, perfect, or enforce any lien against property of the estate;

(5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title;

(6) any act to collect, assess, or recover a claim against the debtor that arose before the commencement of the case under this title;

(7) the setoff of any debt owing to the debtor that arose before the commencement of the case under this title against any claim against the debtor; and

(8) the commencement or continuation of a proceeding before the United States Tax Court concerning the debtor.

(b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970 (15 U.S.C. 78eee(a)(3)), does not operate as a stay —

(1) under subsection (a) of this section, of the commencement or continuation of a criminal action or proceeding against the debtor;

(2) under subsection (a) of this section, of the collection of alimony, maintenance, or support from property that is not property of the estate;

(3) under subsection (a) of this section, of any act to perfect an interest in property to the extent that the trustee's rights and powers are subject to such perfection under section 546(b) of this title or to the extent that such act is accomplished within the period provided under section 547(e)(2)(A) of this title;

(4) under subsection (a)(1) of this section, of the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(5) under subsection (a)(2) of this section, of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power;

(6) under subsection (a) of this section, of the setoff by a commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency of any mutual debt and claim under or in connection with commodity contracts, as defined in section 761(4) of this title, forward contracts, or securities contracts, as defined in section 741(7) of this title, that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, arising out of commodity contracts, forward contracts, or securities contracts against cash, securities, or other property held by or due from such commodity broker, forward contract merchant, stockbroker, financial institutions, or securities clearing agency to margin, guarantee, secure, or settle commodity contracts, forward contracts, or securities contracts;

(7) under subsection (a) of this section, of the setoff by a repo participant, of any mutual debt and claim under or in connection with repurchase agreements that constitutes the setoff of a claim against the debtor for a margin payment, as defined in section 741(5) or 761(15) of this title, or settlement payment, as defined in section 741(8) of this title, arising out of repurchase agreements against cash, securities, or other property held by or due from such repo participant to margin, guarantee, secure or repurchase agreements;

(8) under subsection (a) of this section, of the commencement of any action by the Secretary of Housing and Urban Development to foreclose a mortgage or deed of trust in any case in which the mortgage or deed of trust held by the Secretary is insured or was formerly insured under the National Housing Act and covers property, or combinations of property, consisting of five or more living units;

(9) under subsection (a) of this section, of the issuance to the debtor by a governmental unit of a notice of tax deficiency;

(10) under subsection (a) of this section, of any act by a lessor to the debtor under a lease of nonresidential real property that has terminated by the expiration of the stated term of the lease before the commencement of or during a case under this title to obtain possession of such property; or [*sic*]

(11) under subsection (a) of this section, of the presentment of a negotiable instrument and the giving of notice of and protesting dishonor of such an instrument;

(12)* under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Transportation under the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage, or a security interest in or relating to a vessel or vessel under construction, held by the Secretary of Transportation under section 207 or title XI of the Merchant Marine Act, 1936 (46 App. U.S.C. 1117 and 1271 et seq., respectively), or under applicable State law; or

(13)* under subsection (a) of this section, after the date which is 90 days after the filing of such petition, of the commencement or continuation, and conclusion to the

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* [*Ed. Note:* Paragraphs (12) and (13) were added to 11 U.S.C. § 362(b) by § 5001 of the Omnibus Budget Reconciliation Act of 1986, Pub. L. No. 99-509 (1986). Section 5001(b) of Pub. L. No. 99-509 provides:

"the amendments made by subsection (a) of this section shall apply only to petitions filed under section 362 of this title 11, United States Code, which are made after August 1, 1986."

This is inaccurate. "Petitions" are not made under § 362. The proper reference probably should be to "requests" made pursuant to § 362(d). If "petitions" were intended, then the reference should be to "cases commenced."

Section 5001(a) also provides that its provisions apply only to title 11 cases commenced before December 31, 1989.]

entry of final judgment, of an action which involves a debtor subject to reorganization pursuant to chapter 11 of this title and which was brought by the Secretary of Commerce under the Ship Mortgage Act, 1920 (46 App. U.S.C. 911 et seq.) (including distribution of any proceeds of sale) to foreclose a preferred ship or fleet mortgage in a vessel or mortgage, deed of trust, or other security interest in a fishing facility held by the Secretary of Commerce under section 207 or title XI of the Merchant Marine Act, 1936 (46 App. U.S.C. 1117 and 1271 et seq. respectively).

(c) Except as provided in subsections (d), (e), and (f) of this section —

(1) the stay of an act against property of the estate under subsection (a) of this section continues until such property is no longer property of the estate; and

(2) the stay of any other act under subsection (a) of this section continues until the earliest of —

(A) the time the case is closed;

(B) the time the case is dismissed; or

(C) if the case is a case under chapter 7 of this title concerning an individual or a case under chapter 9, 11, 12, or 13 of this title, the time a discharge is granted or denied.

(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay —

(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or

(2) with respect to a stay of an act against property under subsection (a) of this section, if —

(A) the debtor does not have an equity in such property; and

(B) such property is not necessary to an effective reorganization.

(e) Thirty days after a request under subsection (d) of this section for relief from the stay of any act against property of the estate under subsection (a) of this section, such stay is terminated with respect to the party in interest making such request, unless the court, after notice and a hearing, orders such stay continued in effect pending the conclusion of, or as a result of, a final hearing and determination under subsection (d) of this section. A hearing under this subsection may be a preliminary hearing, or may be consolidated with the final hearing under subsection (d) of this section. The court shall order such stay continued in effect pending the conclusion of the final hearing under subsection (d) of this section if there is a reasonable likelihood that the party opposing relief from such stay will prevail at the conclusion of such final hearing. If the hearing under this subsection is a preliminary hearing, then such final hearing shall be commenced not later than thirty days after the conclusion of such preliminary hearing.

(f) Upon request of a party in interest, the court, with or without a hearing, shall grant such relief from the stay provided under subsection (a) of this section as is necessary to prevent irreparable damage to the interest of an entity in property, if such interest will suffer such damage before there is an opportunity for notice and a hearing under subsection (d) or (e) of this section.

(g) In any hearing under subsection (d) or (e) of this section concerning relief from the stay of any act under subsection (a) of this section —

(1) the party requesting such relief has the burden of proof on the issue of the debtor's equity in property; and

(2) the party opposing such relief has the burden of proof on all other issues.

(h) An individual injured by any willful violation of a stay provided by this section shall recover actual damages, including costs and attorneys' fees, and, in appropriate circumstances, may recover punitive damages.

APPENDIX D

SECTION ELEVEN (11 U.S.C. § 29)

§ 11. Suits By and Against Bankrupts. a. A suit which is founded upon a claim from which a discharge would be a release, and which is pending against a person at the time of the filing of a petition by or against him, shall be stayed until an adjudication or the dismissal of the petition; if such person is adjudged a bankrupt, such action may be further stayed until the question of his discharge is determined by the court after a hearing, or by the bankrupt's filing a waiver of, or having lost, his right to a discharge, or, in the case of a corporation, by its failure to file an application for a discharge within the time prescribed under this Act: *Provided, however,* That such stay shall be vacated by the court if, in a proceeding under this Act commenced within six years prior to the date of the filing of the petition in bankruptcy, such person has been granted a discharge, or has had a composition confirmed, or has had an arrangement by way of composition confirmed, or has had a wage earner's plan by way of composition confirmed.

b. The court may order the receiver or trustee to enter his appearance and defend any pending suit against the bankrupt.

c. A receiver or trustee may, with the approval of the court, be permitted to prosecute as receiver or trustee any suit commenced by the bankrupt prior to the adjudication, with like force and effect as though it had been commenced by him.

d. Suits shall not be brought against a person who has acted as a receiver or trustee of a bankrupt estate, upon any matter arising in connection with the administration thereof, subsequent to two years after the estate has been closed.

e. A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate upon any claim against which the period of limitation fixed by Federal or State law

had not expired at the time of the filing of the petition in bankruptcy. Where, by any agreement, a period of limitation is fixed for instituting a suit or proceeding upon any claim, or for presenting or filing any claim, proof of claim, proof of loss, demand, notice, or the like, or where in any proceeding, judicial or otherwise, a period of limitation is fixed, either in such proceeding or by applicable Federal or State law, for taking any action, filing any claim or pleading, or doing any act, and where in any such case such period had not expired at the date of the filing of the petition in bankruptcy, the receiver or trustee of the bankrupt may, for the benefit of the estate, take any such action or do any such act, required of or permitted to the bankrupt, within a period of sixty days subsequent to the date of the adjudication or within such further period as may be permitted by the agreement or in the proceeding or by applicable Federal or State law as the case may be.

f. The operation of any statute of limitations of the United States or of any State, affecting the debts of a bankrupt provable under this Act, shall be suspended during the period from the date of the filing of the petition in bankruptcy (1) until the expiration of thirty days after the date of the entry of an order denying his discharge; or (2) if he has waived or lost his right to a discharge, then until the expiration of thirty days after the filing of such waiver or loss of such right or, in the case of a corporation, if no application for a discharge is filed within the period of six months after the adjudication, then until the expiration of thirty days after the end of such period; or (3) until thirty days after the dismissal of the bankruptcy proceedings, whichever may first occur.

APPENDIX E

SECTION 542 (11 U.S.C. § 542)

§ 542. Turnover of property to the estate.

(a) Except as provided in subsection (c) or (d) of this section, an entity, other than a custodian, in possession, custody, or control, during the case, of property that the trustee may use, sell, or lease under section 363 of this title, or that the debtor may exempt under section 522 of this title, shall deliver to the trustee, and account for, such property or the value of such property, unless such property is of inconsequential value or benefit to the estate.

(b) Except as provided in subsection (c) or (d) of this section, an entity that owes a debt that is property of the estate and that is matured, payable on demand, or payable on order, shall pay such debt to, or on the order of, the trustee, except to the extent that such debt may be offset under section 553 of this title against a claim against the debtor.

(c) Except as provided in section 362(a)(7) of this title, an entity that has neither actual notice nor actual knowledge of the commencement of the case concerning the debtor may transfer property of the estate, or pay a debt owing to the debtor, in good faith and other than in the manner specified in subsection (d) of this section, to an entity other than the trustee, with the same effect as to the entity making such transfer or payment as if the case under this title concerning the debtor had not been commenced.

(d) A life insurance company may transfer property of the estate or property of the debtor to such company in good faith, with the same effect with respect to such company as if the case under this title concerning the debtor had not been commenced, if such transfer is to pay a premium or to carry out a nonforfeiture insurance option, and is required to be made automatically, under life insurance contract with such company that was entered into before the date of the filing of the petition and that is property of the estate.

(e) Subject to any applicable privilege, after notice and a hearing, the court may order an attorney, accountant, or other person that holds recorded information, including books, documents, records, and papers, relating to the debtor's property or financial affairs, to to [sic] turn over or disclose such recorded information to the trustee.

SECTION 549 (11 U.S.C. § 549)

§ 549. Postpetition transactions.

(a) Except as provided in subsections (b) or (c) of this section, the trustee may avoid a transfer of property of the estate —

(1) made after the commencement of the case; and

(2)(A) that is authorized only under section 303(f) or 542(c) of this title; or

(B) that is not authorized under this title or by the court.

(b) In an involuntary case, a transfer made after the commencement of such case but before the order for relief to the extent any value, including services, but not including satisfaction or securing of a debt that arose before the commencement of the case, is given after the commencement of the case in exchange for such transfer, notwithstanding any notice or knowledge of the case that the transferee has.

(c) The trustee may not avoid under subsection (a) of this section a transfer of real property to a good faith purchaser without knowledge of the commencement of the case and for present fair equivalent value unless a copy or notice of the petition was filed, where a transfer of such real property may be recorded to perfect such transfer, before such transfer is so perfected that a bona fide purchaser of such property, against whom applicable law permits such transfer to be perfected, could not acquire an interest that is superior to the interest of such good faith purchaser. A good faith purchaser without knowledge of the commencement of the case and for less than present fair equivalent value has a lien on the property transferred to the extent of any present value given, unless a copy or notice of the petition was so filed before such transfer was so perfected.

(d) An action or proceeding under this section may not be commenced after the earlier of —

(1) two years after the date of the transfer sought to be avoided; or

(2) the time the case is closed or dismissed.

APPENDIX F

TEXAS REVISED CIVIL STATUTES ANNOTATED

Article 5529.

Every action other than for the recovery of real estate, for which no limitation is otherwise prescribed, shall be brought within four years next after the right to bring the same shall have accrued and not afterward.

Article 5510.

Any person who has the right of action for the recovery of lands, tenements or hereditaments against another having peaceable and adverse possession thereof, cultivating, using or enjoying the same, shall institute his suit therefor within ten years next after his cause of action shall have accrued, and not afterward. The peaceable and adverse possession contemplated in this article, as against the person having right of action, shall be construed to embrace not more than one hundred sixty acres, including the improvements or the number of acres actually enclosed, should the same exceed one hundred and sixty acres; but when such possession is taken and held under some written memorandum of title, other than a deed, which fixes the boundaries of the possessor's claim and is duly registered, such peaceable possession shall be construed to be co-extensive with the boundaries specified in such instrument.

APPENDIX G

ROBERT A. SIKES AND JANICE K. SIKES,
Plaintiffs-Appellants,

v.

GLOBAL MARINE, INC., et al.,
Defendants-Appellees

No. 88-2160.

United States Court of Appeals,
Fifth Circuit.

Aug. 25, 1989.

Personal injury suit was filed against debtor and other defendants after debtor had filed Chapter 11 petition. Upon learning of bankruptcy petition, plaintiffs sought relief from stay and extension of time for service. The Bankruptcy Court entered orders allowing personal injury action to go forward. The United States District Court for the Southern District of Texas, Filemon B. Vela, J., granted debtor's motion to dismiss, and plaintiffs appealed. The Court of Appeals, Politz, Circuit Judge, held that: (1) acts taken in violation of automatic stay are merely voidable and capable of discretionary cure, rather than voidable and incurable, and (2) bankruptcy court's orders referring to personal injury suit filed against debtor postpetition but without knowledge of bankruptcy filing was not intended to merely allow plaintiffs to refile complaint, but, rather, validated prepetition filing of complaint by granting relief from stay.

Reversed and remanded.

Johnson, Circuit Judge, filed dissenting opinion.

1. Bankruptcy — 2462

Acts taken in violation of automatic stay are merely voidable and capable of discretionary cure, rather than voidable and incurable. Bankr.Code, 11 U.S.C.A. § 362(a, d).

2. Bankruptcy — 2442

Bankruptcy Code section empowering court to grant relief from stay by terminating, annulling, modifying or conditioning stay, by its use of term "annul," authorizes court to validate actions taken subsequent to impressing of automatic stay.

See publication Words and Phrases for other judicial constructions and definitions.

3. Bankruptcy — 2442

Bankruptcy court's orders referring to personal injury suit filed against debtor postpetition but without knowledge of bankruptcy filing was not intended to merely allow plaintiffs to refile complaint, but, rather, validated postpetition filing of complaint by granting plaintiffs relief from stay; order did not differentiate between claims filed and those not yet filed or complaints served and those not yet served, but merely authorized the indentified claims to "go forward." Bankr.Code, 11 U.S.C.A. § 362(a, d).

Bruce W. Bain, Houston, Tex., for plaintiffs-appellants.

M. Susan Hardie, Marion E. McDaniel, Jr., Houston, Tex., for defendants-appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before RUBIN, POLITZ, and JOHNSON, Circuit Judges.

POLITZ, Circuit Judge:

Robert A. Sikes and Janice K. Sikes appeal a judgment granting a Fed.R.Civ.P. 12(b)(6) dismissal of their demands against Global Marine, Inc. and Global Marine Drilling Company (collectively, Global) on the ground that their complaint was filed in violation of an automatic stay in bankruptcy, 11 U.S.C. § 362(a). Concluding that the bankruptcy court validated the filing and authorized the

Sikes to proceed with their complaint, we reverse and remand.

Background

On March 6, 1983 the Sikes filed suit against Global and other defendants for injuries allegedly sustained by Robert A. Sikes on April 12, 1983, while aboard the vessel M/V GLOMAR HIGH ISLAND III. Unbeknownst to the Sikes, on January 27, 1986 Global had filed voluntary petitions in bankruptcy under Chapter 11 of the Bankruptcy Code. As a consequence, their claim was automatically stayed by 11 U.S.C. § 362(a).[1]

The Sikes promptly sought relief from the automatic stay from the bankruptcy court, and an extension of the time for service of the complaint from the district court. Accrual of the three-year limitations was imminent. Global objected in district court to the extension of time for service, contending that the original complaint was null and void. In the bankruptcy court Global asked that the stay not be modified until resolution of a coverage dispute with their insurance carriers. Global further requested that the stay not be lifted pending their transition to debtor-in-possession status.

Approximately nine months later Global resolved the insurance dispute and agreed to a modification of the stay. On February 18, 1987, the bankruptcy court entered an order lifting the stay for 32 causes listed on Exhibit A attached to the order, all identified as matters for which motions to lift stay were pending. The order lifted the stay "for the limited purpose of allowing certain actions to be commenced against Global and allowing discovery to

[1] 11 U.S.C. § 362(a), in part, provides:

(a) Except as provided in subsection (b) of the section, a petition filed under section 301, 302 or 303 of this title . . . operates as a stay, applicable to all entities, of—(1) the commencement or continuation, including the issuance or employment of process, of a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title . . .

proceed in those actions." The Sikes' claim is listed as number 27 on Exhibit A. In a significant number of the other claims, suit had been filed after the Chapter 11 petitions were filed. Shortly thereafter the original complaint was served on Global.

Global moved to dismiss the Sikes complaint, contending that the original complaint was filed in violation of the automatic stay and was thus null and void. The Sikes filed a new lawsuit and moved for consolidation. Global opposed consolidation on the grounds that the second complaint was barred by the statute of limitations.

On September 25, 1987 the bankruptcy court entered an agreed order, prepared by counsel for Global, modifying the automatic stay. The preamble to the order announced: "CAME ON FOR CONSIDERATION for hearing the various motions to lift the automatic stay to allow personal injury actions to go forward, as identified in Exhibit A attached hereto." The Sikes' claim is listed as number 26 on the exhibit, this time containing 45 claims. The order declared

> that the automatic stay as provided by section 362 of the Bankruptcy Code be further modified with regard to those Motions to Lift Stay identified in Exhibit A for the limited purpose of allowing the personal injury actions identified therein to be commenced against Global, permitting personal injury actions that are pending against Global to proceed, allowing discovery to proceed in those actions, and allowing trials to proceed.

The court prohibited any attempts to enforce or collect on any judgment without further approval of the court.

In urging the motions to dismiss Global maintained that the orders of the bankruptcy court did not validate the earlier filing, that a new filing was necessary. After granting Global's motions to dismiss the district court made the requisite Fed.R.Civ.P. 54(b) determination and the Sikes appealed.

Analysis

[1] A threshold consideration is whether the filing of the Sikes complaint in violation of the automatic stay is void, in the strict sense of that term, or merely voidable. By strict definition that which is void is nugatory and of no effect and cannot be cured; that which is voidable may be either voided or cured. *Black's Law Dictionary,* 1411 (5th ed. 1979); *In re Oliver,* 38 B.R. 245 (Bankr.Minn.1984). We early observed in *Haggart v. Wilczinski,* 143 F. 22, 27 (5th Cir.1906), that when "technical accuracy is desired, the term 'void' can only be properly applied to those [transactions] ... that are of no effect whatsoever, mere nullities, ... and therefore incapable of confirmation or ratification."

The distinction between the terms is much less precise and clear in practical usage. Courts considering whether actions taken in violation of the automatic stay are void or voidable have reached opposite conclusions. Some courts have concluded that actions which violate the automatic stay are void, and therefore incurable. *Miller v. Savings Bank of Baltimore,* 10 B.R. 778 (Bankr.D.Md.1981); *Advent Corp. v. Fidelity & Deposit Company of Maryland,* 24 B.R. 612 (Bankr. 1st Cir.1982); 2 *Collier on Bankruptcy,* 362.11 (15th ed. 1979) (citing cases which hold that actions taken in violation of the stay are void and without effect). Other courts have concluded that the violative actions are merely voidable, and capable of discretionary cure. *In re Fuel Oil Supply and Terminaling, Inc.,* 30 B.R. 360 (Bankr.N.D.Tex.1983); *In re Oliver; In re Brooks,* 79 B.R. 479 (9th Cir.BAP 1987); *In re Sapp,* 91 B.R. 520 (Bankr.E.D.Mo. 1988).

We are persuaded that the better reasoned rule characterizes acts taken in violation of the automatic stay as voidable rather than void. We agree that "the characterization of every violation of section 362 as being absolutely void is inaccurate and overly broad." *Fuel Oil Supply,* 30 B.R. at 362.

[2] In section 362(d) Congress empowered the court to grant relief from the automatic stay "by terminating,

annulling, modifying, or conditioning" the stay. The power to annul authorizes retroactive relief even unto the date of the filing of the petition giving rise to the automatic stay. The power to annul authorizes the court to validate actions taken subsequent to the impressing of the section 362(a) stay. Our colleagues in the Eleventh Circuit reached this conclusion in *In re Albany Partners, Ltd.*, 749 F.2d 670 (11th Cir.1984) declaring that section 362(d)

> expressly grants bankruptcy courts the option, in fashioning appropriate relief, of "annulling" the automatic stay, in addition to merely "terminating" it. The word "annulling" in this provision evidently contemplates the power of bankruptcy courts to grant relief from the stay which has retroactive effect; otherwise its inclusion, next to "terminating," would be superfluous.

749 F.2d at 675. We agree. So does one preeminent secondary authority:

> In addition to the obvious power to "terminate" the stay, [§ 362(d)] also gives the bankruptcy court the power to "annul" the stay. The difference between the two is that an order annulling the stay could operate retroactively to the date of the filing of the petition which gave rise to the stay, and thus validate actions taken by the party at a time when he may have been unaware of the existence of the stay. On the other hand, an order terminating the stay would be operative only from the date of its entry.

2 *Collier's Bankruptcy Manual*, § 362.06 (3d ed. 1983).

We find instructive the fact that the Bankruptcy Code specifically protects certain actions taken in violation of the automatic stay. Under section 549 some transactions made in violation of the stay will be deemed valid unless voided at the trustee's discretion. 11 U.S.C. § 549 ("the trustee may avoid a transfer of property of the estate—(1) that occurs after the commencement of the case . . ."). Section 542(c) ratifies transfers by parties having no knowledge of the bankruptcy case. 11 U.S.C. § 542(c). If everything done post-petition were void in the strict sense of the word, these provisions would either be meaningless or inconsistent with the

specific mandate of section 362(a). We reject both alternatives in concluding that filing a complaint in an unknowing violation of the automatic stay is voidable, not void.[2]

[3] Having concluded that the initial filing of the Sikes complaint was merely voidable, we must determine whether the bankruptcy court intended to validate the filing of the original complaint. We conclude that it did. In entering its orders on February 18, 1987 and again on September 25, 1987, the bankruptcy court referred to those cases in which motions to lift stay had been filed. Those cases were identified by name of the claimants and the names and addresses of claimants' counsel. The court specifically allowed actions to commence and allowed pending actions to proceed. We are bound to assume, absent clear demonstration to the contrary, that the bankruptcy court was aware of the filing date of the respective complaints. Aware of the filing date of the Sikes complaint, the bankruptcy court permitted it to proceed.

We recognize that the order was an *en globo* order, one which did not differentiate between claims filed and those not yet filed, or complaints served and those not yet served. The order authorized the identified claims to "go forward," "commence," "proceed." As we perceive the orders, they contemplated an appropriate application to each case, eliminating the necessity for 32 separate orders in February, increased to 45 orders by September.

When the Sikes filed their complaint they were unaware of the bankruptcy petitions. Upon learning of the automatic

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[2]Our decision today does not conflict with the Supreme Court's holding in *Kalb v. Feuerstein*, 308 U.S. 433, 60 S.Ct. 343, 346, 84 L.Ed. 370 (1940), involving a post-petition real property foreclosure action, where the Court stated: "[T]he action of the Walworth County Court was not merely erroneous but was beyond its power, void, and subject to collateral attack." When the Supreme Court decided *Kalb* in 1940, bankruptcy referees had the express statutory power only to modify or terminate the automatic stay. The power to annul the stay had not been authorized. Accordingly, where the violation of the stay was statutorily proscribed and an applicable exception did not exist, the violative action was void. That scenario no longer applies.

stay they moved the court for relief from the stay. The bankruptcy court granted that relief. We find the court's intent clear — it was permitting these claims to proceed to judgment. We decline to accept Global's argument that the order merely allowed the Sikes permission to refile their complaint. We perceive no valid purpose to be served by requiring that the Sikes file more papers with an already burdened court. Nor are we prepared to burden the Sikes with adverse effects flowing from any imprecision in the language of the order which Global prepared.

We hold that the filing of the Sikes' complaint was a voidable action and that the bankruptcy court had the option to validate it. We further hold that the bankruptcy court validated the filing when it granted the Sikes relief from stay in its order of February 19, 1984, as restated and reinforced in its order of September 25, 1987.

We REVERSE and REMAND for further proceedings consistent herewith.

JOHNSON, Circuit Judge, dissenting:

In entering its agreed orders modifying the automatic stay in the instant case, the bankruptcy court, in its first order, allowed the commencement of certain personal injury actions against the debtor Global and, in its subsequent order, allowed those actions to proceed forward. The majority today concludes that, on the basis of the above orders, the bankruptcy court validated the otherwise void filing of the personal injury complaint of the Sikes in violation of the automatic stay. Persuaded that the above conclusion interprets too broadly the relevant orders of the bankruptcy court and contravenes the fundamental purpose underlying the automatic stay in bankruptcy, I respectfully dissent.

In general, "[a]cts in violation of the [automatic] stay are void *ab initio* regardless of lack of knowledge of the filing of the petition." *Matter of J & L Transport, Inc.*, 47 B.R. 51, 52-53 (Bkrtcy.W.D.Wis.1985). The majority, however, states that such acts are in some instances voidable, instead of void, by virtue of the express powers granted to the

bankruptcy court in Section 362(d) of the Bankruptcy Code to grant relief from the automatic stay "by terminating, annulling, modifying, or conditioning" the stay. While in agreement with the proposition that a bankruptcy court may validate an otherwise void filing in violation of the automatic stay, I am not persuaded that such was the intent of the bankruptcy court in the instant case for the following reasons.

After several parties petitioned the bankruptcy court for relief from the automatic stay triggered by the filing by Global for bankruptcy relief, the bankruptcy court, pursuant to an agreed order entered on February 18, 1987, modified the automatic stay "for the *limited* purpose of allowing [certain] personal injury actions ... to be commenced against Global and allowing discovery to proceed in those actions." Among those personal injury actions allowed to be commenced by the February 18 order, as identified in the attachment to that order, as identified in the attachment to that order, was the personal injury action of the Sikes against Global. In so identifying the action of the Sikes in the February 18 order, however, the bankruptcy court did not refer to the cause number of the previous complaint filed by the Sikes in violation of the automatic stay. Thereafter, the bankruptcy court entered another agreed order on September 25, 1987, further modifying the automatic stay for the limited purpose of allowing "personal injury actions that are pending against Global to proceed, allowing discovery to proceed in those actions, and allowing trials to proceed." Contrary to the conclusion reached by the majority today, I am persuaded that the express language of the February 18 order of the bankruptcy court only allowed the *commencement* of personal injury actions against Global. Thereafter, the September 25 order allowed the continuation of previous personal injury action already *validly* filed against Global by virtue of the earlier modification of the automatic stay by the February 18 order. In this regard, the agreed orders of the bankruptcy court did not relate back to the initial filing by the Sikes of their complaint in violation of the automatic stay and validate that filing. To infer such

a radical form of relief from the limited actions of the bankruptcy court contravenes a fundamental purpose of the automatic stay in bankruptcy — that purpose being to provide the debtor with relief from his creditors and their collection efforts.

This is not to say that a bankruptcy court may never validate otherwise void filings should it choose to do so; the majority opinion ably sets forth the powers of the bankruptcy court in this regard. Nevertheless, this Court should not imply such relief from the automatic stay in the absence of an express intent by the bankruptcy court to afford that relief. If the bankruptcy court in the instant case had intended to validate otherwise void filings in violation of the automatic stay, it could have expressly provided for such relief through the inclusion of specific language to such effect in its orders. It did not do so. Accordingly, I respectfully dissent.

Supreme Court, U.S.
FILED
FEB 9 1990
JOSEPH F. SPANIOL, JR.
CLERK

(3)

No. 89-1096

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

IN THE MATTER OF: H. ROGER LAWLER, *etc.*, Debtor,

H. ROGER LAWLER,
Petitioner,

VS

THEODORE A. PAULISSEN, *et ux.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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February, 1990

33pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals for the Fifth Circuit erred, or undermined established law, in holding that actions taken in violation of the automatic stay provisions of the Bankruptcy Act of 1898 (repealed) are voidable, rather than void.

2. Whether the issues involved in the case at bar set forth "special" or "important" reasons for the granting of a writ of certiorari.

3. Whether a complaint to recover property foreclosed on during the gap period between the filing of an involuntary bankruptcy case and the adjudication of the debtor as bankrupt filed nearly six years after the foreclosure took place can be barred by a federal or state statute of limitations.

4. Whether the Petition for a Writ of Certiorari filed by Petitioner is so frivolous as to merit the granting of costs and attorneys' fees to Respondents.

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No. 89-1096

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

In the Matter of: H. ROGER LAWLER, *etc.*, Debtor,

H. ROGER LAWLER,

Petitioner,

v.

THEODORE A. PAULISSEN, *et ux.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Respondents Theodore A. Paulissen and May Ruth Paulissen ("Respondents") respectfully pray that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit (the "Petition") of Petitioner H. Roger Lawler ("Petitioner") be denied and that the judgment of the Court of Appeals for the Fifth Circuit in Case No. 88-1738 entered on August 21, 1989 not be reviewed.

OPINION BELOW

Appendix A to the Petition properly contains the judgment sought to be reviewed by Petitioner.

JURISDICTION

Respondents agree that 28 U.S.C. § 1254(1) is the basis for this Court's jurisdiction asserted by Petitioner; however, Respondents deny that the decision of the Court of Appeals for the Fifth Circuit is in conflict with other decisions of this and other courts.

STATUTORY PROVISIONS INVOLVED

The Petition correctly sets forth the statutes involved herein and all are contained in the Appendix to the Petition.

STATEMENT OF THE CASE

Petitioner and a number of related entities were put into involuntary bankruptcy in Nevada on January 9, 1976. (Record Excerpts ("R.E."), p. 127, Order Granting Motion for Summary Judgment, ¶ 1.) The bankruptcy case was transferred to the Northern District of Texas on June 4, 1976 and, according to the Order granting the Respondents' Motion for Summary Judgment, on "January 17, 1978", Petitioner consented to an adjudication of bankruptcy. (R.E., p. 127, Order Granting Motion for Summary Judgment, ¶ 2.) The Original Complaint (the "Complaint") commencing this case, however, indicates Petitioner consented to the adjudication on January 20, 1978. (R.E., p. 40, Original Complaint, ¶ III.)

Petitioner purchased the real property at issue in this case from the Respondents on or about August 1, 1974 and gave the Respondents a non-recourse promissory note secured by a deed of trust, which they properly recorded in the Deed Records of Collin County, Texas. (R.E., p. 127, Order Granting Motion for Summary Judgment, ¶ 3.) Petitioner defaulted on the note and the substitute trustee under the deed of trust foreclosed on the property on "May 3, 1977" in satisfaction of the debt. (R.E., p. 128, Order Granting Motion for Summary Judgment, ¶ 4.) The trustee's deed is recorded in Book 1041, Page 649 of the Deed Records of Collin County, Texas. (R.E., p. 128, Order Granting Motion for Summary Judgment, ¶ 4.) (For the Court's information, although the May 3rd date is contained in Petitioner's Complaint, the document recorded in Book 1041, Page 649 of the Collin County, Texas Deed Records is dated March 13, 1977 and recites a March 1, 1977 foreclosure date. In addition, at the June 15, 1981 hearing on Petitioner's Application to Employ Attorney for Additional Special Purpose, Petitioner's counsel indicated that the foreclosure by Respondents had

occurred on March 13, 1977. This error, however, is legally irrelevant for the purposes of this Petition.)

Petitioner filed his Complaint alleging the Respondents had foreclosed on the Collin County property in violation of the automatic stay on December 13, 1983, nearly six years after the foreclosure sale. (R.E., p. 128, Order Granting Motion for Summary Judgment, ¶ 5.) The Complaint did not contain any allegation that Respondents knew about the pending involuntary bankruptcy case, but simply prayed that the foreclosure sale be declared null and void and that the property be conveyed back to Petitioner's bankruptcy estate. (R.E., pp. 38-43, Original Complaint.)

On May 22, 1981, Petitioner filed an application in the Bankruptcy Court asking that he be permitted to retain special litigation counsel to proceed against a number of persons alleged to have held foreclosure sales during the "gap period" between the date of the involuntary petition and the date of adjudication. (R.E., p. 3, No. 16, under Docket Entry #529.) A hearing was held on June 15, 1981, at which time the Court raised the concern that Petitioner's only motivation in pursuing these matters was the fact that the foreclosed properties had appreciated in value during the years between the 1977 foreclosure dates and 1981. (R.E., pp. 79-80 and 83-84; Record, pp. 281-82 and 285-86, Transcript of 6/15/81 hearing, pp. 7-8 and pp. 11-12.) Petitioner's counsel assured the Court that his only motivation was to provide "substantial benefits to the estate and to the creditors" and that the litigation was necessary to "preserve the estate." (R.E., p. 84; Record, p. 286, Transcript of 6/15/81 hearing, p. 12.) At no time during the hearing did Petitioner's counsel indicate that any of the numerous creditors alleged to have conducted gap period foreclosure sales had known about the pending involuntary bankruptcy case or had not complied with the notice provisions of Texas's foreclosure statutes. (R.E., p. 73-89, Transcript of 6/15/81 hearing.)

The issue of whether special counsel should be retained was continued pending further investigation of the alleged post-petition foreclosures and a second hearing was held on

July 30, 1981. (R.E., p. 88, Transcript of 6/15/81 hearing, p. 16.) At that hearing, the Court once again expressed concern about Petitioner's motivation and indicated that he would not condone litigation based on post-petition foreclosures where the only issue might be the intervening increases in the value of the foreclosed properties. (R.E., p. 92; Record, p. 355, Transcript of 7/30/81 hearing, p. 3.) The Court permitted the retention of special counsel for the sole purpose of preparing a report regarding the feasibility of the proposed litigation, but suggested that such litigation should not be brought if there was no equity for the estate in the foreclosed properties at the time of the foreclosures. (R.E., pp. 111, 117 and 119, Transcript of 7/30/81 hearing, pp. 22, 28 and 30.)

It is not clear from the Record whether the report was prepared, but docket entry #561, dated October 8, 1981, indicates Petitioner was informed that pending a determination of the solvency of the estate, his Application would be taken under advisement unless he was willing to employ counsel on a contingent fee basis. Docket entry #564, dated November 5, 1981, indicates Petitioner was not so inclined. No order was ever entered authorizing the employment of special litigation counsel. Two years later, Petitioner simply filed the lawsuit against the Respondents. In 1984, Petitioner's plan of arrangement (the "Plan") was confirmed providing a recovery to Petitioner's creditors of 100 percent of their principal and post-petition interest. (Record, p. 335.) The Plan did not provide for any treatment of Respondents' secured claim in the event Petitioner was ever successful in avoiding the gap period foreclosure at issue herein.

SUMMARY OF ARGUMENT

I. The Fifth Circuit did not err, nor undermine established law, in holding that actions taken in violation of the automatic stay are voidable, rather than void. A careful reading of the cases cited by Petitioner reveals that the Fifth Circuit's decision in this case was not in conflict with these decisions. Those courts that have actually analyzed the distinction between void and voidable in

the automatic stay context have concluded that the ability of the court to annul the stay makes a violation thereof voidable because it is capable of being cured. Therefore, while some courts use the words void and voidable interchangeably when the distinction is not at issue, the Fifth Circuit's ruling in this case was clearly in line with established case law.

II. No special or important reasons exist for granting a writ of certiorari in this case. The statute at issue was repealed twelve years ago and the current similar statute, to the extent it is relevant, contains a provision allowing the bankruptcy court to sanction intentional violators of the automatic stay. Therefore, the decision of the Fifth Circuit in this case will have no far-reaching effects on the administration of bankruptcy cases.

III. Petitioner's Complaint was time barred by both the applicable state and federal statutes of limitations. Section 11(e) of the Bankruptcy Act required the Petitioner to have filed his Complaint within two years of his adjudication as bankrupt. Therefore, the Complaint should have been filed on or before January 20, 1980. Article 5529, Tex. Rev. Civ. Stat. Ann. required Petitioner to have filed his Complaint within four years of the date the cause of action arose. Therefore, the Complaint should have been filed on or before May 3, 1981. No tolling statutes were in effect for the benefit of Petitioner and his Complaint was simply filed too late.

IV. Respondents are entitled to recover their costs and reasonable attorneys' fees. The Petition is frivolous because it involves a repealed statute and arguments which have been unsuccessful numerous times in the past.

ARGUMENT

I. The Fifth Circuit did not err, nor undermine established law, in holding that actions taken in violation of the automatic stay are voidable, not void.

Petitioner asserts that jurisdiction would be proper in this Court, pursuant to 28 U.S.C. § 1254(1), for the reason that the Fifth Circuit's decision was in conflict with *Kalb v. Feuerstein*, 308 U.S. 433 (1940), *In re Louisiana Ship Management, Inc.*, 761 F.2d 1025 (5th Cir. 1985) and "a legion of decisions from eight other federal circuit courts of appeals and numerous district and bankruptcy courts." (Petition, p. 2, and cases cited therein.) However, a careful reading of *Kalb, Louisiana Ship* and the "legion" of other decisions cited by the Petitioner reveals that the Fifth Circuit's decision in the case at bar was *not* in conflict with these decisions.

Kalb, Louisiana Ship and the "legion" of other decisions do not contain substantive holdings that actions in violation of the stay are void, as opposed to voidable, as did the Fifth Circuit's decision in the case at bar. The decisions cited by Petitioner do not analyze the void/voidable distinction and methodically reach a conclusion with respect to that distinction. Rather, the decisions cited by Petitioner merely contain *dicta*, without analysis, that actions in violation of the stay are void. However, there is an ample body of case authority that *does*, in fact, analyze the void/voidable distinction and which methodically reaches a conclusion with respect to that distinction. This case authority almost unanimously embraces the view, either explicitly or by result, that actions in violation of the stay are properly categorized as *voidable*, not void. *E.g., Sikes v. Global Marine, Inc.*, 881 F.2d 176 (5th Cir. 1989); *Albany Partners, Ltd. v. Westbrook (In re Albany Partners, Ltd.)*, 749 F.2d 670 (11th Cir. 1984); *Washington Mut. Savings Bank v. James (In re Brooks)*, 79 Bankr. 479 (Bankr. 9th Cir. 1987), *aff'd*, 871 F.2d 89 (9th Cir. 1989); *Mellor v. Pistole (In re Mellor)*, 31 Bankr. 151 (Bankr. 9th Cir. 1983), *rev'd on other grounds*, 734 F.2d 1396 (9th Cir. 1984); *Sports & Science, Ind., Inc. v. Rielly (In re Sports & Science, Ind., Inc.)*, 95 Bankr. 745 (Bankr. C.D. Cal. 1989); *Sapp v. Wilson (In re Sapp)*, 91 Bankr. 520 (Bankr. E.D. Mo. 1988); *In re Clark*, 79 Bankr. 723 (Bankr. S.D. Ohio 1987); *In re Tanksley*, 70 Bankr. 429 (Bankr. E.D. Mo. 1987); *In re Oliver*, 38 Bankr. 245 (Bankr. D. Minn. 1984); *Hadsell*

v. Philadelphia Life Ins. Co. (In re Fuel Oil Supply and Terminaling, Inc.), 30 Bankr. 360 (Bankr. N.D. Tex. 1983).

The body of case law cited above is not, as Petitioner would have this Court believe, "out of step" with established law. (Petition, p. 15.) Rather, the case law cited above technically analyzes the void/voidable issue as was necessary under the facts presented in each case. In *Kalb, Louisiana Ship* and the other cases cited by Petitioner, no technical distinction between "void" and "voidable" was necessary for the facts at issue. However, whenever such a distinction was necessary, the better-reasoned cases—and the majority of cases—hold that the "voidable" categorization is more plausible in light of the automatic stay provisions of the applicable bankruptcy statute. In summary, the Fifth Circuit's decision in the case at bar was not in error and did not undermine established law.

The Fifth Circuit's opinion in *Sikes*, rendered just four days after the Fifth Circuit's unpublished decision in the case at bar, seems to be the most comprehensive opinion analyzing the void/voidable distinction. *Sikes*, 881 F.2d at 176. In the *Sikes* opinion, the Fifth Circuit begins its analysis by considering the strict definitions of the words "void" and "voidable":

> By strict definition that which is void is nugatory and of no effect and cannot be cured; that which is voidable may be either voided or cured. [Citing *Black's Law Dictionary*, 1411 (5th ed. 1979)] . . . [W]hen "technical accuracy is desired, the term "void" can only be properly applied to those [transactions] . . . that are of no effect whatsoever, mere nullities, . . . and therefore incapable of confirmation or ratification." [citations omitted]

Sikes, 881 F.2d at 178.

The *Sikes* Court went on to conclude that actions in violation of the stay are most appropriately categorized as voidable. The *Sikes* Court's conclusion seemed to be based on three observations.

Firstly, Section 362(d) of the Bankruptcy Code of 1978 (like its predecessor, Rule 601(c) of the Bankruptcy Act) gives bankruptcy courts the power to *annul* the stay and retroactively validate violations of the stay. Section 362(d) reads:

> On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, *annulling*, modifying, or conditioning such stay . . .

11 U.S.C. § 362(d). Likewise, Rule 601(c), the predecessor of Section 362(d) under the Bankruptcy Act, reads:

> The court may, for cause shown, terminate, *annul*, modify, or condition such stay.

R. of Bankr. P. 601(c) (repealed). Thus, the bankruptcy courts have the power to annul the stay and retroactively ratify certain violations. Therefore, violations of the stay must be *voidable* as opposed to void. That which is capable of being cured or ratified is voidable. Void acts are incapable of retroactive ratification.

Secondly, the *Sikes* Court observed that Sections 549 and 542(c) of the Bankruptcy Code specifically protect certain actions taken in violation of the stay. Section 549 provides that some transactions made in violation of the stay will be deemed valid unless voided at the trustee's discretion. Section 542(c) ratifies certain transfers made by parties having no knowledge of the bankruptcy case. The Court reasoned that Sections 549 and 542(c) would be either *meaningless* or *inconsistent* with Section 362 if post-petition violations were strictly deemed *void*.

Finally, the *Sikes* Court observed that the Supreme Court's decision in *Kalb*, on which many courts have relied in stating that actions taken in violation of the stay are void, was rendered *before* the bankruptcy courts were given the express statutory power to annul the stay and grant retroactive relief. Therefore, the Fifth Circuit in *Sikes*, like the Fifth Circuit in the case at bar, simply did not believe that *Kalb*

was controlling due to the changes that had occurred in the stay provisions. Additionally, it seems that *Kalb* is not controlling since the void/voidable distinction was not of any material consequence in the *Kalb* case. In *Kalb*, the void/voidable distinction was not even analyzed. This Court merely held that a county court had been without jurisdiction to order a foreclosure and eject a debtor from his property during the pendency of the stay.

The *Sikes* decision, and the Fifth Circuit's decision in the case at bar, are not aberrations of the law. As indicated previously, many courts have reached the conclusion, either expressly or by result, that actions taken in violation of the stay are voidable not void. *E.g., Albany Partners*, 749 F.2d at 670; *Brooks*, 79 Bankr. at 479; *Mellor*, 31 Bankr. at 151; *Sports & Science*, 95 Bankr. at 745; *Sapp*, 91 Bankr. at 520; *Clark*, 79 Bankr. at 723; *Tanksley*, 70 Bankr. at 429; *Oliver*, 38 Bankr. at 245; *Fuel Oil Supply*, 30 Bankr. at 360. As noted by Judge Flowers in *Fuel Oil Supply*, "[T]he characterization of every violation of § 362 as being absolutely void is inaccurate and overly broad." *Fuel Oil Supply*, 30 Bankr. at 362. Further, as has been observed by so many courts, the word "annulling" in Section 362(d) and Rule 601(c), seems to compel the inference that violations of the stay are voidable rather than void. After all, "Annul implies a reach-back ability." *Clark*, 79 Bankr. at 725. If the bankruptcy court may "reach back" and cure, violations of the stay cannot literally be void.

In fact, the Texas courts themselves have recognized that a foreclosure conducted in violation of the automatic stay is voidable as opposed to void. In the case cited by Petitioner, *Claude Regis Vargo Enterprises, Inc. v. Bacarisse*, 578 S.W.2d 524 (Tex. Civ. App.—Houston [14th Dist.] 1979, writ ref'd n.r.e.), a foreclosure sale was held in violation of the automatic stay. The Bankruptcy Court in the Southern District of Texas annulled the stay. The issue for the decision by the Texas state court was whether the filing of the petition for bankruptcy prior to the completion of the foreclosure sale rendered that sale totally invalid and of no effect. After stating initially that the sale was invalid, the Court ruled that the order of

the Bankruptcy Court annulling all stays *served to validate the action.* Said the Court "we hold that the action of the Bankruptcy Court in annulling this stay served to invalidate the stay *ab initio,* thus validating the sale conducted after the automatic stay arose upon the filing of the bankruptcy petition." *Id.* at 527.

Petitioner has cited a wealth of case law that does, in fact, state, without analyzing in depth, that actions in violation of the stay are *void ab initio. E.g., NLRB v. Edward Cooper Painting, Inc.,* 804 F.2d 934 (6th Cir. 1986); *Morgan Guaranty Trust Co. of New York v. American Savings and Loan Ass'n.,* 804 F.2d 1487 (9th Cir. 1986); *In re Louisiana Ship Management, Inc.*; *Meyer v. Rowen,* 181 F.2d 715 (10th Cir. 1950). *See also H & H Beverage Distrib. v. Dept. of Revenue of Pennsylvania,* 850 F.2d 165 (3d Cir. 1988); *Brown v. Dellinger (In re Brown),* 734 F.2d 119 (2d Cir. 1984); *Posner v. Tabone (In re Posner),* 700 F.2d 1243 (9th Cir. 1983) (cases that Petitioner cites as standing for the proposition that actions in violation of the stay are void, but which, in fact, never discuss this issue). However, Petitioner's cases must be read in the context in which they were decided. The void/voidable distinction simply was not a crucial factor in these cases. The word "annulling" in Section 362 of the Bankruptcy Code of 1978, and in Rule 601(c) under the Bankruptcy Act of 1898 (repealed), was not addressed in the cases cited by Petitioner. As observed in *Albany Partners,* "It is true that actions taken in violation of the automatic stay are generally deemed void and without effect. [citations omitted] Nonetheless, Section 362(d), [as did Rule 601(c)], expressly grants bankruptcy courts the option, in fashioning appropriate relief, of "annulling" the automatic stay, in addition to merely "terminating" it." *Albany Partners,* 749 F.2d at 675.

This option of annulling compels a conclusion that actions in violation of the stay are, in fact, voidable, not void. It is unfortunate that a number of courts, when the distinction between void and voidable is not specifically at issue, use the words interchangeably as if the concept were generic. This is why only those cases that *analyze* the distinction between

void and voidable should be considered as appropriate authority herein. There is ample authority supporting the Fifth Circuit's decision in this case. The authority relied on by Petitioner, which is seemingly to the contrary, is simply not concerned with the void/voidable distinction. Therefore, the Fifth Circuit did not err, nor undermine established law, in holding that actions in violation of the stay are voidable, not void.

II. No "special" or "important" reasons exist for granting a writ of certiorari in this case.

The Rules of the United States Supreme Court state that:

> A review on writ of certiorari is not a matter of a right, but of *judicial discretion.* A petition for a writ of certiorari will be granted *only* when there are *special* and *important* reasons therefor. The following, while neither controlling, nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:
>
> (a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter . . .
>
> (c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Sup. Ct. R. 10.1 (emphasis added).

It has been said that the "General public importance of the issues, and the need to secure uniformity of federal law, must be the basic touchstones" behind the Court's decision to issue a writ of certiorari. 16 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 4004, p. 508 (1977). To warrant the issuance of a writ, "it must appear that the matter sought to be reviewed has at least some semblance of vitality, that is, as long as it stands it affects

some right or interest of the party applying for the writ." 14 C.J.S. *Certiorari* § 32, p. 177 (1939 & Supp. 1989). A writ should not issue "merely to give an opportunity to determine abstract, academic, hypothetical, or moot questions, even though such a determination would be of public interest." *Id.* Finally, this Court has noted that:

> [I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of Appeals.

Layne & Bowler Corp. v. Western Well Works, Inc., 261 U.S. 387, 393 (1923).

Respondents assert that the facts and issues presented by the case at bar do not raise "special" or "important" reasons for this Court to grant a writ of certiorari. None of the reasons catalogued in this Court's own rules are present in the instant case. For these reasons, Respondents oppose Petitioner's request for a writ of certiorari.

First, as discussed in the previous section, the Fifth Circuit has not rendered a decision in the case at bar that is in serious *conflict* with either a decision of another United States court of appeals on the same matter or with applicable decisions of this Court. *See* Sup. Ct. R. 10.1(a) & (c). The cases cited in Petitioner's brief, which Petitioner describes as conflicting with the Fifth Circuit's decision in the instant case, do not deal squarely with the issues presented in the instant case. No genuine disagreement exists here that cries out for resolution. No "real embarrassing conflict of opinion and authority" exists among the circuit courts of appeals. *Layne & Bowler*, 261 U.S. at 393.

Second, Petitioner has not raised a "special" or "important" federal question which has not been, *but should be*, settled by this Court. *See* Sup. Ct. R. 10.1. Petitioner has asserted that the Fifth Circuit's holding in the instant case, that actions in violation of the stay are voidable, not void,

"will encourage creditors to violate the stay and later seek retroactive sanction for the violative act." (Petition, p. 8). Petitioner warns that this "undermines the fundamental operation of the bankruptcy system." (Petition, p. 8). Surely the technical distinction between the words "void" and "voidable" in the automatic stay context will not have such far-reaching, devastating effects so as to warrant the use of this Court's valuable time.

Since the statute at issue in this case was repealed twelve years ago, the holding in this case, that violations of former Bankruptcy Rule 601(c) are voidable rather than void, will clearly have no grievous repercussions. Assuming, for the sake of argument, that the holding in this case can be used as authority for construing Section 362 of the current Bankruptcy Code, one need only turn to Section 362(h) to realize that bankruptcy courts have more than enough power to prevent the "horribles" about which Petitioner is so concerned.

Logic dictates that an involuntary debtor who has received notice under Texas law that his property is going to be foreclosed would notify his foreclosing creditors that he is involved in a bankruptcy. That way, if the creditor still proceeds with the foreclosure, he can be sanctioned under Section 362(h). In this case, it appears that a near record number of gap period foreclosures occurred leading one to conclude that Petitioner, after receiving notice of the upcoming foreclosure sales, did not bother to notify these creditors of the pending involuntary bankruptcy. It is unlikely such a problem will occur on such a regular basis as to merit the granting of the Petition in this case.

Additionally, if an interpretation that acts in violation of the automatic stay are voidable rather than void will indeed have the calamitous consequences that Petitioner anticipates, perhaps this is an issue which would best be addressed before the United States Congress. After all, the automatic stay provisions of the Bankruptcy Code clearly permit courts to retroactively annul the stay and ratify prior violations. 11

U.S.C. § 362(d) and R. Bankr. P. 601(c) (repealed). If this is bad bankruptcy policy, then Congress should be so advised.

Finally, and as stated previously, Petitioner is, in effect, asking this Court to construe a provision of the Bankruptcy Act of 1898, a statute which was *repealed* in 1978. This, of course, is the law that was in effect when the acts giving rise to this action transpired. In light of the fact that the law which would be construed by this Court was *repealed twelve years ago*, a decision by this Court would be of no precedential value. It was for this very reason that the Fifth Circuit chose not to even publish its decision in the case at bar. Rule 601(c) of the Bankruptcy Act has no "semblance of vitality." 14 C.J.S. *Certiorari* § 32, p. 177. It is a "dead letter." *Id.* While it is true that "the automatic stay under the Act . . . [was] the foundation for the same automatic stay under the Code" (Petition, p. 8) and the automatic stay provisions in effect today mirror those of prior Rule 601, this is not a basis for granting a writ of certiorari. This Court's resources would be better utilized in deciding the void/voidable issue if and when it presents itself under the Bankruptcy Code. Petitioner, by including the Fifth Circuit's opinion in the *Sikes* case in his Appendix, is apparently asking this Court to review that case as well. However, the *Sikes* parties chose not to petition for certiorari, and the *Sikes* case is not before this Court. An analysis of the void/voidable issue in *this* case involving *repealed law* would be purely academic. A writ should not issue to determine academic questions. *See* 14 C.J.S. *Certiorari* § 32. Therefore, Petitioner's Petition should be denied.

III. Petitioner's Complaint was time barred by both the applicable federal and state statutes of limitations.

The Bankruptcy Court found and the District Court and Court of Appeals affirmed that Petitioner's suit against the Respondents was time barred pursuant to the applicable statutes of limitations, Section 11(e) of the Bankruptcy Act and Article 5529, Tex. Rev. Civ. Stat. Ann.. Section 11(e) of the Bankruptcy Act provides that:

> A receiver or trustee may, within two years subsequent to the date of adjudication or within such further period of time as the Federal or State law may permit, institute proceedings in behalf of the estate against which the period of limitation fixed by Federal or State law had not expired at the time of the filing of the petition in bankruptcy.

11 U.S.C. § 29(e), repealed.

This statute of limitations is not limited to causes of action existing prior to bankruptcy as Petitioner would have this Court believe. In *Herget v. Central National Bank & Trust Company*, 324 U.S. 4 (1945), this Court applied the two year statute of limitations to an action to recover a preference. This Court further held that Section 11(e) is not limited to causes of action inherited by the trustee:

> SECTION 11(e) is not limited by its words to actions inherited by the trustee; nor does it discriminate against actions by the trustee accruing to him under the Act. It provides simply that the trustee must bring action on any claim on behalf of the estate within two years subsequent to the date of adjudication or within such further time as the federal or state law permits. . . .

324 U.S. at 8. In *Feldman v. First National City Bank*, 511 F.2d 460 (2nd Cir. 1975), the Court of Appeals for the Second Circuit, citing *Herget*, applied the two year statute of limitations and barred any action by the trustee to recover post-petition payments made by the bankrupt to a third party. *See also Lawler v. RepublicBank Dallas, N.A.*, 53 Bankr. 166 (Bankr. N.D. Tex. 1985), *aff'd*, No. CA3-86-1151-F (N.D. Tex. August 4, 1988), *withdrawn by agreement*, (N.D. Tex. September 6, 1988) (case involving same issues and this Petitioner.)

The Complaint in the *RepublicBank* case was also filed on December 13, 1983 and contained the same prayer as Petitioner's Complaint against Respondents. The only factual difference between the two cases is that the RepublicBank post-petition foreclosure sale took place six months prior to

the Respondents' foreclosure sale. In the *RepublicBank* case, the Bankruptcy Court held that under both applicable bankruptcy law and applicable state law, the statute of limitations had expired. Section 11(e), according to the Court, provided Lawler with a two year statute of limitations commencing from the date Lawler was adjudicated bankrupt. The Court also determined that Lawler's Complaint in the *RepublicBank* case stated a cause of action under Texas law pursuant to the Court's equity powers. Therefore, under Texas law, a four year statute of limitations was applicable. Tex. Rev. Civ. Stat. Ann. art. 5529.

The cases cited by Petitioner for the proposition that Section 11(e) is inapplicable to suits brought to recover post-petition transfers were decided years before *Herget* and *Feldman* and thus, are not controlling. It should also be noted that both of the cases cited by Lawler, *Burnham v. Todd*, 139 F.2d 338 (5th Cir. 1943) and *Stanolind Oil and Gas Company v. Logan*, 92 F.2d 28 (5th Cir. 1937), *cert. denied*, 302 U.S. 763 (1937) did not even construe Section 11(e). They interpreted Section 11(d), a provision which existed prior to the 1938 amendments, and which was superseded by Section 11(e) as well as by subsequent case law.

Petitioner's attempt to distinguish *Herget* as involving a "pre-petition preference action" is ludicrous. Preference actions are by their very nature *post*-petition actions. A "preference" is a bankruptcy term for when a debtor pays one creditor his due during a specified statutory period prior to bankruptcy to the detriment of other *pari passu* creditors. Since it is not illegal under state law to prefer one creditor over another, a preference cause of action *only* comes into existence post-petition and the preference action itself can only exist as a post-petition cause of action.

If Section 11(e) is inapplicable, the only other relevant statute of limitations must be the applicable state statute. Petitioner blithely argues that because there is no relevant statutory period provided by bankruptcy law and because he is not a trustee, he should have an unlimited amount of time in which to bring this action. Such a result would be grossly

inequitable, and case law suggests that Petitioner must look to non-bankruptcy law for a statute of limitations.

The Fifth Circuit has held that where Congress has provided no period of limitations for a federal claim, the federal courts must borrow the applicable statute of limitations from the state in which it sits. *McMillian v. City of Rockmart*, 653 F.2d 907 (5th Cir. 1981); *United Transportation Union v. Florida East Coast Railway Company*, 586 F.2d 520 (5th Cir. 1978); *Ingram v. Steven Robert Corporation*, 547 F.2d 1260 (5th Cir. 1977); *Shaw v. McCorkle*, 537 F.2d 1289 (5th Cir. 1976); *McGuire v. Baker*, 421 F.2d 895 (5th Cir. 1970). The Bankruptcy Court which decided this case sat in the State of Texas, which was also the location of the property, Petitioner and the foreclosure. The Bankruptcy Court, therefore, correctly looked to Texas law to determine whether Petitioner's action was barred by a statute of limitations.

The Court of Appeals correctly ruled that Petitioner's action in the case at bar was barred by the four year statute of limitations contained in Tex. Rev. Civ. Stat. Ann. art. 5529 (Vernon 1958). That statute is a residual limitation statute and is applied in Texas to rights of an equitable nature. *See, Burnham v. Todd*, 139 F.2d 338, 343 (5th Cir. 1943). Petitioner's pleadings in this case were a plea to the equitable powers of the Bankruptcy Court. In his Complaint, Petitioner prayed that the Bankruptcy Court declare the foreclosure on the property to be "null and void" and further prayed that an order be entered requiring the Respondents to convey all property foreclosed upon and sold in violation of the automatic stay to Petitioner's bankruptcy estate. Because Petitioner's lawsuit is a plea to the equitable powers of the Bankruptcy Court, Article 5529 is the state statute which applies in this case.

The case of *Countiss v. Baldwin*, 151 S.W.2d 235 (Tex. Civ. App.—San Antonio 1941, writ dism'd judgmt cor.), is on point. In *Countiss*, Baldwin filed an action in trespass to try title against Countiss to recover title to certain mineral interests. Baldwin's predecessor in title had executed a deed

of trust to a bank. Shortly thereafter, title to the minerals was conveyed to Baldwin. Fifteen years later, an event of default occurred under the terms of the deed of trust, and the bank foreclosed. The mineral interest was then conveyed through various grantees to Countiss. Several years later, Baldwin brought suit seeking a decree that her interest had not been foreclosed by the deed of trust sale. The Court held that Baldwin's interest was foreclosed and that Baldwin was "possessed at most, with a mere equity of redemption, as distinguished from title, legal or equitable, and such equity, if any, was barred by the four year statute of limitations, Article 5529." *Id.* at 239. This holding was subsequently approved by the Texas Supreme Court in *McGeorge v. Van Meter*, 358 S.W.2d 580 (Tex. 1962).

The case of *Ebert v. Smith*, 146 S.W.2d 432 (Tex. Civ. App.—Galveston 1940, writ dism'd judgmt cor.), is also relevant. In *Ebert*, a judgment was entered divesting the plaintiffs of title and possession to 94 acres of land. Fourteen years after the plaintiffs had been divested of their interest in the land, the plaintiffs instituted an action seeking to have the judgment set aside and asking the Court to enter an order requiring the present owner to convey the property to the plaintiffs. The Court noted, as an initial matter, that the plaintiffs were guilty of inexcusable delay in instituting their lawsuit and that they should have known that the judgment had been entered previously. Said the Court:

> That long and inexcusable delay upon their part, under well settled authority in Texas, made it the duty of the court of equity to which they applied, in passing upon their appeal to its power to relieve them from that open and public adjudication they were in duty bound to know about, to, instead, deny their delayed request as a stale demand.

Id. at 434. The Court held that even though the lawsuit was an action in trespass to try title, Article 5529 set forth a limitations period which constituted at least a *minimum period* in which a person had to bring their claim. The Court noted further that the plaintiffs had many times in their

arguments conceded that the old judgment divested them of all title to the land so that plaintiffs were left with "nothing but such an equitable or executory right of action, if any, to have it set aside as only a court of equity could take cognizance of; and that sort of an action is clearly subject to the defense of stale demand or laches. . . . " *Id.* at 435

In this case, Petitioner waited in excess of six years before he decided to take action to get the property back. In order for Petitioner to be able to set aside this sale, he had to make an equitable plea to the Bankruptcy Court asking that the properly-recorded deed of the Respondents be set aside, and that the Respondents be ordered to deliver the deed to the Petitioner. Nowhere in Petitioner's pleadings is it mentioned that his lawsuit is a trespass to try title suit, because it is not such a lawsuit, and such a lawsuit would be of no avail to him. *Hughes v. Wright,* 127 S.W.2d 215 (Tex. Civ. App.—Fort Worth 1939, no writ). Only after Petitioner lost before the Bankruptcy Court, did he come before the District Court to claim that his prayer for equitable relief was not a suit in equity and that, therefore, a ten year statute of limitations should apply. The District Court and the Court of Appeals correctly determined that this argument was without merit by affirming the decision of the Bankruptcy Court.

Petitioner emphasizes the fact that he brought the Respondents' foreclosure, as well as the other gap period foreclosures, to the Bankruptcy Court's attention on May 22, 1981 (in excess of four years after the foreclosure) and then blames the Court for the additional two and one-half years it took to file the lawsuit. While these excuses may create a defense to an allegation of laches, they are irrelevant in this case. The statute of limitations is a mechanical date and when it expires, the cause of action is gone. It is irrelevant whether the plaintiff missed the date for good cause, which in this case, the Respondents do not concede Petitioner has.

Petitioner's argument that he was waiting for the Bankruptcy Court to approve the appointment of special counsel is also without merit. The Record clearly indicates that at

the time Petitioner brought suit against the Respondents, no such approval had been received.

Petitioner asserts that even if the statute of limitations was applicable to him, it had tolled. Petitioner asserts that once he brought the potential litigation to the Court's attention on May 22, 1981, the time between May 22, 1981 and December 13, 1983 should not be counted. Petitioner forgets that on May 22, 1981, both the two year and four year statutes of limitations had *already expired.* Therefore, even if the subsequent two and one-half year delay was the Court's fault, it cannot save Petitioner in this instance.

Petitioner seeks to use the subsequent July 30, 1981 hearing as a judicial determination that the statute of limitations was tolled for him. The statement of the Court at the July 30, 1981 hearing was not a judicial finding. It was merely part of Judge Gandy's thought process in evaluating the potential litigation at a hearing on whether to allow Petitioner to retain special counsel. The issue of whether the statute of limitations had tolled for Petitioner with respect to the Respondents was not before the Court. No one briefed or researched the issue of whether Petitioner could take advantage of the trustee's tolling provisions since, at the time of the hearing, the case was still in progress and a trustee was in place. None of the bankruptcy judges before whom this case has proceeded have ever held that the applicable statute of limitations was tolled for the benefit of Petitioner.

The tolling provisions of Section 11(e) are only available to the trustee, not to the debtor. *See, Burroughs v. Local Acceptance Company (In the Matter of Dickson),* 432 F. Supp. 752, 756 (W.D. N.C. 1977), (the court, noting that while the trustee could bring suit by virtue of Section 11(e), stated "There is no tolling provision for the *debtors,* however, and so their action is barred by the statute, and will be dismissed.") (emphasis original); *see also, Costello v. Pan American World Airways, Inc.,* 295 F. Supp. 1384 (S.D.N.Y. 1969). The trustee in this case declined to bring this action against the Respondents. (Record, p. 355, Amended Application of Debtor for Authority to Employ Attorneys for Additional

Special Purpose, p. 3.) Since the trustee declined to bring this action, the Petitioner is pursuing it, and Petitioner, as the debtor, was not the beneficiary of any tolling statute.

If Petitioner was so concerned with these alleged post-petition foreclosures, he should have brought them to the Court's attention some years earlier (like sometime during the three years that elapsed between the date of adjudication and the May 22, 1981 Application) and sought a judicial determination that he was a beneficiary of the trustee's tolling provisions. It was too late to raise these issues in 1981 and it was far too late on December 13, 1983. Nor does the fact that Petitioner's confirmed Plan subsequently gave him these causes of action cure the fact that the statute of limitations had expired long before confirmation. Indeed, since in 1981, Petitioner indicated he was desirous to have gap period foreclosure sales avoided for the benefit of his creditors and since by 1984, all creditors had been paid in full, one can only hypothesize that Judge Gandy's concern about Petitioner's motivation in pursuing these lawsuits was not misplaced.

IV. Respondents are entitled to recover costs and attorneys' fees.

The Rules of the United States Supreme Court provide that:

> When a petition for a writ of certiorari, an appeal, or application for other relief is frivolous, the Court may award the respondent or appellee just damages and single or double costs. Damages or costs may be awarded against the petitioner, appellant, or applicant, or against the party's attorney or against both.

Sup. Ct. R. 42.2.

Thus, Supreme Court Rule 42.2 provides that a "frivolous" petition for a writ of certiorari may warrant the imposition of damages and costs against a petitioner and/or his attorney. Indeed, this Court has utilized this Rule in the past when the circumstances justified it. See *Hyde v. Van Wormer*, 474 U.S. 992 (1985) (damages of $500 were awarded to each of two sets of respondents following the denial of certiorari);

Hatch v. Reliance Ins. Co., 474 U.S. 1048 (1986) (damages of $500 were awarded without further explanation); *see also Tatum v. Regents of University of Nebraska*, 460 U.S. 1048 (1983) (Court denied certiorari and directed petitioner to file a response to the respondent's motion for damages; three months later the Court granted the motion and awarded $500 damages); *Potamkin Cadillac Corp. v. U.S.*, 462 U.S. 1144 (1983); *Gullo v. McGill*, 462 U.S. 1101 (1983).

Respondents assert that Petitioner's request for a writ of certiorari in the case at bar is, indeed, frivolous as contemplated by Supreme Court Rule 42.2. Therefore, Respondents respectfully move that this Court award just costs and attorneys' fees against Petitioner.

Supreme Court Rule 42.2 "sets no standards for determining when a petition for certiorari is 'frivolous,' or the amount of damages which may be 'appropriate.' " *Hyde*, 474 U.S. at 992. However, various courts of appeals have noted that an "appeal is frivolous when it involves legal points not arguable on their merits." *E.g. Hagerty v. Succession of Clement*, 749 F.2d 217, 222 (5th Cir. 1984). The *Hagerty* Court, acting under Fed. R. App. P. 38, the analog to Supreme Court Rule 42.2 in the Federal Rules of Appellate Procedure, imposed double costs and attorneys' fees against an appellant who had "imposed an unnecessary burden on th[e] court and ha[d] infringed on the rights of the appellees who [were] entitled to prompt adjudication of th[e] dispute, which had been protracted in one form or another for more than six years." *Hagerty*, 749 F.2d at 222.

The court in *Clerk v. Commissioner*, 744 F.2d 1447 (10th Cir. 1984) imposed attorneys' fees and double costs against an appellant whose arguments were "timeworn" and "legally frivolous." *Id.* at 1448. The court noted that "Courts have the inherent power to impose a variety of sanctions on both litigants and attorneys in order to regulate their docket, promote judicial efficiency, and deter frivolous filings." *Id.* at 1447 (citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 764-67 (1980).) Finally, the court in *Ratcliff v. State of Texas*, 714 F.2d 24 (5th Cir. 1983) determined that an appeal was

frivolous and warranted the imposition of sanctions where it was "obvious" that the "appeal was prosecuted for the purpose of harassment or out of sheer obstinacy." *Id.* at 25. The court believed that the appellant had wasted the valuable time of the court.

Respondents urge this Court to utilize its authority pursuant to Supreme Court Rule 42.2 to impose attorneys' fees and costs against the Petitioner. This case was filed on December 13, 1983, nearly six years after the foreclosure sought to be avoided. While ordinarily, the avoidance of post-petition foreclosures is an important part of accumulating the assets that make up a debtor's estate so that those assets can be distributed to creditors on a *pro rata* basis, in this case, Petitioner's vigorous pursuit of this lawsuit is, to say the least, baffling.

In 1977, Respondents were secured creditors of Petitioner. If the decision of the Fifth Circuit were to be reversed, the case would go back to the Bankruptcy Court for trial on the merits. Respondents would attempt to prove that they had no actual or constructive knowledge of the pending involuntary bankruptcy case, that they had notified Petitioner of the foreclosure and that the value of the property was equal to the amount of the debt owed by Petitioner at the time of the foreclosure. If the property at issue herein were returned to Petitioner because the foreclosure was invalidated, Respondents would, once again, become secured creditors of Petitioner, and, if Petitioner failed to pay the principal and interest due and owing on the note evidencing the debt, Respondents would, once again, be entitled to foreclose on the property securing the debt.

As Petitioner aptly quotes in the Petition: the automatic stay "permits the debtor to attempt a repayment or reorganization plan." H.R. No. 595, 95th Cong., 1st Sess. 340-42 (1977). In this case, Petitioner, in 1984, confirmed his Plan which paid his creditors in full. Therefore, the purpose of the bankruptcy laws was fulfilled six years ago. Petitioner is either proceeding with this lawsuit on the belief that he can avoid a secured creditor's foreclosure *and* avoid repaying the

related debt, or Petitioner is, as Judge Gandy feared, using the bankruptcy system to recover property for his own (as opposed to his creditors') benefit because it has appreciated in value since the foreclosure date, thirteen years ago.

Petitioner has been a party to approximately fifteen lawsuits against his creditors and the trustee arising out of his bankruptcy case, all of which he continued to pursue years after confirmation of his Plan. As noted by Judge Akard in *Lawler v. Brinkerhoff*, 74 Bankr. 991 (Bankr. N.D. Tex. 1987), Petitioner has a "seemingly inexhaustible supply of funds for attorneys' fees" and "continuous litigation", and "has apparently appealed every adverse ruling made by a Bankruptcy Judge in this case." *Id.* at 995-96 and f.n.1. The facts of this case and Petitioner's long standing litigious nature seriously bring into question the good faith of Petitioner in pursuing this matter.

In addition to the foregoing, Respondents believe this Petition is wholly frivolous for the reason that it does not involve "special" or "important" questions of federal law around which a genuine conflict currently exists. Petitioner is wasting the valuable time of this Court and of the Respondents.

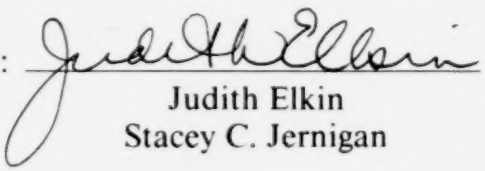
Therefore, Respondents respectfully pray that this Court award appropriate costs and attorneys' fees to Respondents pursuant to Supreme Court Rule 42.2.

CONCLUSION

The issues involved in this case simply do not present special or important reasons for the granting of a writ of certiorari. The Court of Appeals for the Fifth Circuit did not err or undermine established law in holding that a violation of the automatic stay provisions of the Bankruptcy Act of 1898 (repealed) was voidable rather than void, and that therefore, Petitioner's Complaint was barred by the applicable statute of limitations. Therefore, Respondents respectfully pray that Petitioner's Petition for a Writ of Certiorari be denied and that Respondents be awarded costs and attorneys' fees from Petitioner.

RESPECTFULLY SUBMITTED THIS 9TH DAY OF FEBRUARY, 1990.

HAYNES AND BOONE

By: 
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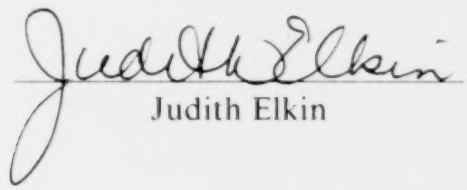
CERTIFICATE OF SERVICE

I hereby certify that 3 copies of this Brief in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit have been served upon Petitioner, H. Roger Lawler, by depositing the copies in the United States mail with first-class postage prepaid, addressed to Petitioner's counsel of record, C. Thomas Wesner, Jr., Esq., Wesner Coke Boyd & Clymer, P.C., 5430 LBJ Freeway, LB 7, 660 Three Lincoln Centre, Dallas, Texas 75240 on February 9th, 1990.

All parties required to be served have been served.



Judith Elkin